(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALBERT KRAMER and STEPHEN D'ANJOU,

Petitioners,

v.

MARILYN PRICE et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a civil rights lawsuit under 42 U.S.C. section 1983, does the failure to appeal from a pretrial order denying qualified immunity to two police officers result in a waiver of the issue insofar as it is based on the record that existed at the time of the pretrial order?

2. Where two jurors withhold pertinent background information on voir dire that directly relates to the case and then disclose that information during deliberations, does such conduct deprive a party of a fair trial?

LIST OF PARTIES

Plaintiffs and Respondents: Marilyn Price (as guardian ad litem for Lohren Price), Cheryl Cramer (as guardian ad litem for Daniel Mason), and Nicole Cramer (as guardian ad litem for Nicholas Cramer).

Defendants and Petitioners: Albert Kramer and Stephen D'Anjou.

Defendants: City of Torrance and Joseph DeLadurantey.

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PETITION FOR WRIT OF CERTIORARI

Albert Kramer and Stephen D'Anjou respectfully request this court to issue a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court denied the officers' pretrial motion for qualified immunity in an unpublished order, which is reprinted in the Appendix at 47a. Following trial, the district court denied the officers' motion for new trial in an unpublished order, which is reprinted in the Appendix at 58a.

The original opinion of the Ninth Circuit was filed on January 11, 2000, and is published at 200 F.3d 1237; the opinion is also reprinted in the Appendix at 1a.

On February 22, 2000, the Ninth Circuit filed an unpublished order and memorandum denying defendants' petition for rehearing and rehearing en banc. The order and memorandum are reprinted in the Appendix at 43a.

JURISDICTION

This court has jurisdiction under 28 U.S.C. section 1254(1). This petition has been filed within 90 days of the

denial of defendants' petition for rehearing, which (as mentioned above) occurred on February 22, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Seventh Amendment to the United States Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

California Vehicle Code section 2806 provides:

"Any regularly employed and salaried police officer or deputy sheriff having reasonable cause to believe that any vehicle or combination of vehicles is not equipped as required by this code or is in such unsafe condition as to endanger any person, may require the driver to stop and

submit the vehicle or combination of vehicles to an inspection and such tests as may be appropriate to determine the safety to persons and compliance with the code."

California Vehicle Code section 24252, subdivision (a) provides:

"[L]ighting equipment of a required type installed on a vehicle shall be maintained in good working order."

California Vehicle Code section 27315, subdivision (d)(1) provides:

"[N]o person shall operate a private passenger motor vehicle unless that person and all passengers 16 years of age or over are properly restrained by a safety belt."

Torrance Municipal Code section 45.2.1, subdivision (a) provides:

"It is unlawful for any minor to be present in a public place or on the premises of any establishment within the City during curfew hours."

INTRODUCTION

This case involves civil rights violations allegedly perpetrated by two police officers from the City of Torrance, California. As in many such cases, a key defense here was "qualified immunity," with the officers contending that they had reasonable suspicion to detain the plaintiffs. The district court denied the officers' pretrial motion based on qualified immunity, and the officers did not pursue an interlocutory appeal from that ruling. See

Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The Ninth Circuit held that the propriety of the pretrial ruling was not reviewable on an appeal from the final judgment. That holding conflicts with the holdings of at least three other circuits.

This case also involves serious jury misconduct. Two jurors failed to divulge on voir dire that they had significant, negative past incidents with the police. This concealment was then compounded when the jurors divulged these past incidents during deliberations. The Ninth Circuit held – contrary to the undisputed facts of the case – that the "jurors' past personal experiences were of a *general* nature" and could not have influenced the deliberations. But the experiences were not general; they were specific and similar to the allegations made by plaintiffs in this case. This juror misconduct deprived the police officers of a fair trial.

STATEMENT OF THE CASE

Plaintiffs Lohren Price, Daniel Mason, and Nicholas Cramer (through their respective guardians ad litem) sought monetary damages against Albert Kramer and Stephen D'Anjou (the police officers), the City of Torrance, and Joseph DeLadurantey (the chief of police) for civil rights violations under 42 U.S.C. section 1983. Jurisdiction in the district court was invoked under 28 U.S.C. section 1343.

1. The Facts Concerning the Traffic Stop as Set Forth in the Pretrial Motion Requesting Qualified Immunity

On May 27, 1994, at shortly after midnight, Torrance police officers Kramer and D'Anjou were patrolling their assigned area in a marked police car. Traffic was light, and the officers noticed plaintiffs' car traveling slowly in the other direction. Kramer and D'Anjou made a u-turn and began to follow plaintiffs' car. The officers saw the rear passenger (Cramer) turn around and glance suspiciously back toward the officers' car. App. 62a. As Cramer himself testified: "I believe I glanced very quickly behind and I realize that that was something I shouldn't have done immediately, because I felt . . . like it would be interpreted as suspicious." App. 90a.

After passing one gas station, plaintiffs' car pulled into a second station. The officers passed by the car and noted the license number. The officers then stopped across the street and continued to observe plaintiffs' car. While stopped, the officers contacted police communications by radio and learned that plaintiffs' car was registered to a woman with a West Los Angeles address. The officers saw only three males in plaintiffs' car. App. 62a.

When plaintiffs left the gas station, they proceeded in the opposite direction from where they had been traveling. This led the officers to suspect that plaintiffs were traveling to no particular destination. A municipal ordinance makes it unlawful for a person under the age of 18 to aimlessly drive or ride about the public streets between 10 p.m. and sunrise. App. 70a.

As they continued to follow plaintiffs' car, the officers stated they could see that at least two of the occupants were not wearing seat belts. App. 62a. In opposing the motion for qualified immunity, plaintiffs contended that the officers could not have seen the lack of seat belt use. App. 77a-78a. However, both Price and Cramer admitted in their depositions (which were attached to the moving papers) that they were not wearing their seat belts. App. 92a-93a. Under the state Vehicle Code, drivers and passengers must wear seat belts. Cal. Vehicle Code § 27315, subds. (a), (e).

The officers stopped plaintiffs' car and asked all three occupants to get out. Plaintiffs contended that both officers had drawn their guns and pointed them at the car; the officers denied this. App. 80a. Officer Kramer asked all three plaintiffs individually where they were going. Price and Mason stated they were driving to visit a friend; Cramer, however, stated that they were just driving around with no particular destination. App. 63a, 96a-98a. Price admitted in deposition that he lied to Officer Kramer. App. 97a.

Officer Kramer also conducted individual pat-down searches for weapons. App. 63a. Plaintiffs claimed that Officer Kramer went beyond such a search, and that he forcefully grabbed and pulled on their testicles as he was searching them. App. 80a. Officer Kramer denied this, and further stated that none of the plaintiffs exhibited any signs they were in pain during the search.

Officer Kramer then entered the passenger compartment where he tested the lights and turn signals. He also investigated the rear seat belts in response to Cramer's

complaint that the rear seat belt did not work. Finally, Officer Kramer opened the trunk and inspected the connections for all the rear lights. App. 63a. Following the inspection, Officer D'Anjou issued a citation to Price for failing to wear a seat belt and failure to maintain lighting equipment. Officer Kramer issued a citation to Cramer for failing to wear a seat belt. *Ibid.*

On the basis of these facts, the district court (Judge David V. Kenyon) denied defendants' pretrial motion for qualified immunity. The court held that while "the officers could have legitimately stopped Plaintiffs' vehicle [for seat belt violations, it] is not necessarily determinative of the stop's reasonableness." App. 54a. The court also held that the reasonableness of the officers' pat-down search and vehicle search was an issue of fact because of plaintiffs' allegations that the officers approached the vehicle with guns drawn and that plaintiffs' testicles were grabbed and pulled. App. 55a. However, the court failed to address the officers' contention that plaintiffs had never alleged excessive force. See App. 95a. The officers did not file an interlocutory appeal from this order.

2. The Facts Concerning the Jurors' Statements on Voir Dire and Their Later Conduct During Deliberations

During voir dire, a prospective juror, Glenn Eggert, disclosed that he had tried to break up a fight while in high school and ended up being cited for an "open container" violation. Eggert stated that, in hindsight, he understood that the officer was only trying to do his job.

App. 104a-105a. Eggert did *not* disclose that the officer had physically pushed him against a van. App. 130a, 137a, 141a. Eggert also failed to disclose that the incident left a lasting and negative impression. App. 130a-132a, 143a.

Another prospective juror, John Wilhite, did not disclose that he was once on a "ride-along" program and observed officers who swore at a detainee and then ripped a radio from a car and poured beer into the trunk. App. 123a.

Both Eggert and Wilhite were chosen for the jury, with Eggert being selected as foreperson. App. 119a. On the first day of plaintiffs' case, Eggert and Wilhite had a conversation regarding the testimony of plaintiff Mason. Eggert told Wilhite he believed Mason's version of the events. App. 123a-124a, 132a-134a.

During deliberations, Eggert told the other jurors about his past police experience; he said that the experience "shocked" him, and that he did not think the physical part of the contact was right. App. 131a. Eggert also stated that he could identify with the plaintiffs because he had been a 17-year-old victim of police misconduct; this statement appeared to sway the other jurors. App. 134a-135a. Wilhite also shared the experience of his "ride-along" with the jury panel. App. 123a.

Defendants moved for new trial based in part on the above incidents, and requested a full evidentiary hearing on the issue of juror misconduct. App. 109a. This did not occur; instead, and over defendants' objection, the district judge and counsel interviewed Eggert over the

telephone and took his unsworn statement. App. 127a. Eggert essentially admitted all of the conduct set forth above. Concerning his negative contact with police when he was 17 years old, Eggert and the district judge engaged in the following exchange:

"THE COURT: . . . What I understood you to have said, and correct me if it's wrong, it was and remains a negative event, but you no longer blame anybody for it?"

"THE WITNESS: Correct.

"THE COURT: Is that a fair statement?

"THE WITNESS: *My impression of that is still negative and it did like affect my opinion about police officers to this day,* but I do also – yeah, correct." (Italics added.) App. 144a.

The district judge found that Eggert's negative impression of law enforcement did not make any difference: "Did it color his view of law enforcement? No doubt it did, . . . but I would suspect that almost everyone in this room has had some experience that colored his view of law enforcement, good, bad, or indifferent." App. 154a. The district judge denied the motion for new trial.

3. The Ninth Circuit's Opinions

In a published opinion (200 F.3d 1237), the Ninth Circuit affirmed the pertinent portion of the judgment.[1]

The court declined to address the merits of the officers' claim that the pretrial order denying them qualified immunity was improper. In doing so, the court relied on its rule that " 'the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits.' " App. 10a; 200 F.3d at 1243, quoting *Locricchio v. Legal Servs. Corp.*, 833 F.2d 13523, 1358-1359 (9th Cir. 1987). The court *did* review the qualified immunity issue based on the trial record, however, and held that "the jury had sufficient evidence to permit it to conclude that a reasonable officer would have know it was unlawful in light of clearly established law." App. 12a-13a; 200 F.3d at 1244.[2]

The Ninth Circuit also held that the juror misconduct did not deprive the officers of a fair trial. Specifically addressing the issue of the concealment by Eggert and

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[1] Plaintiffs had agreed to abandon their claims against the City and the police chief, but the district court refused to dismiss those parties. The Ninth Circuit reversed that portion of the judgment and ordered the district court to enter judgment in favor of these two defendants. App. 40a-41a; 200 F.3d at 1256.

[2] The court added the following footnote after deciding it would not review the merits of the pretrial order: "Because we are reluctant to leave the impression that defense counsel may have forfeited important rights of their clients by their inaction, we note that our review of the record reveals that the defendants would not have prevailed had a timely interlocutory appeal been taken. At the least, there was a genuine issue of fact as to the relevant issues." App. 12a; 200 F.3d at 1244 n. 7.

Wilhite of their prior "negative" police experiences, the court held: "The two jurors' past personal experiences were of a general nature, and involved only minor incidents that could not have prejudice [*sic*] the jury or influenced its decision." App. 39a; 200 F.3d at 1255.

The police officers filed a petition for rehearing, contending that (1) the panel's opinion conflicted with decisions from other circuits that a pretrial order denying qualified immunity could be reviewed on appeal from a final judgment, and (2) the cumulative juror misconduct warranted a new trial as a matter of law.

On February 22, 2000, the Ninth Circuit filed an unpublished order and memorandum opinion denying the petition for rehearing. The panel held that its original opinion did not conflict with those of other circuits. According to the panel, the "general rule" is: " 'Failure to appeal pretrial denial of a motion for summary judgment based on official immunity, for example, may be followed by a trial that produces information different from the information made available on the summary judgment motion. *Review after trial should be based on sufficiency of the evidence at trial, not the sufficiency of the evidence on the summary judgment record.*' " App. 45a, quoting 15A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3911 n. 80, italics in original. In so holding, the panel did not cite any of the cases relied on by the officers in their petition for rehearing.[3]

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[3] The memorandum did not discuss the officers' second contention concerning juror misconduct.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

There is a Conflict Among the Circuits as to Whether a Pretrial Order Denying Qualified Immunity May be Reviewed on an Appeal From a Final Judgment Where No Interlocutory Appeal Was Taken

In general, pretrial orders are not immediately appealable in federal courts. However, as this court has recognized, there is a "small class" of decisions that finally determine important rights and do not "require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), this court held that a pretrial order denying qualified immunity is one such decision that can be immediately appealed.

In the present case, the police officers did not appeal from the pretrial order denying them qualified immunity, but sought review of the order on appeal after trial. However, the Ninth Circuit refused to consider the merits of the officers' contention. According to the Ninth Circuit, the only way to preserve this contention is to file an interlocutory appeal from the denial of the motion. The Ninth Circuit believes that this approach "reflects the prevailing view among the federal circuits." App. 10a; 200 F.3d at 1243.

The "prevailing view among the federal circuits," however, is exactly the opposite. In *Ernst v. Child & Youth Services of Chester County*, 108 F.3d 486 (3d Cir. 1997), the

Third Circuit held that an attorney representing a county children's services agency "did not forfeit her right to appeal the district court's denial of her motion for summary judgment on immunity grounds by waiting to file a notice of appeal until after entry of a final judgment against her." *Id.* at 493. Similarly, in *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993), the Fifth Circuit reviewed the propriety of a pretrial order denying qualified immunity, ultimately concluding "we concur in the denial of summary judgment." *Id.* at 1115. And most recently, in *Goff v. Bise*, 173 F.3d 1068 (8th Cir. 1999), the Eighth Circuit applied a de novo standard and flatly held that "a district court's denial of summary judgment based on qualified immunity . . . is reviewable after a trial on the merits." *Id.* at 1072.

The courts of appeals have set forth two rationales explaining the propriety of reviewing a pretrial decision after trial. In *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988), the Fifth Circuit explained that the qualified immunity doctrine serves both as an immunity from suit as well as a protection from a damages award, and the latter "remains [a concern] after a trial." *Matherne, supra*, 851 F.2d at 756. Also, mandating an interlocutory appeal would force unnecessary appeals:

> "There may be good reasons why a defendant may elect to not appeal before trial, and we see little value in a rule of waiver that would force unwanted appeals, many of which undoubtedly never would have been necessary. In short, the right to appeal before trial belongs to a defendant, protecting him from money damages as well from the costs of defending a suit. We see no reason to force pretrial appeals." *Ibid.*

The Third Circuit also rejected the "waiver" notion in *Ernst v. Child & Youth Services of Chester County, supra,* 108 F.3d 486. The *Ernst* court applied the general rule that " 'if matters are adjudged by an interlocutory decree that is subject to immediate appeal, and no appeal is taken, they are not foreclosed, but are subject to review on appeal from the final judgment.' " *Id.* at 492-493, citing 9 *Moore's Federal Practice* § 110.18 at 194 (1996). The *Ernst* court also relied on a Seventh Circuit decision for this proposition:

> "A rule that required people to appeal from potentially 'final' decisions not embodied in separate documents [within the meaning of Fed.R.Civ.P. 58] would lead to a blizzard of protective appeals as litigants tried to ensure their rights to review; many times the rule would lead to pointless forfeitures as litigants overlooked the possibility that a particular order might be characterized as a 'final decision.'"

Id. at 493, quoting *Exchange Nat'l Bank of Chicago v. Daniels,* 763 F.2d 286, 290 (7th Cir. 1985). The *Ernst* court thus concluded:

> "We can see no meaningful distinction between interlocutory orders denying summary judgment on immunity grounds and other appealable interlocutory orders. Accordingly, we think it appropriate to extend the general rule to interlocutory orders denying summary judgment on immunity grounds." *Ibid.*

In the present case, the Ninth Circuit did not cite any of the above authorities in its opinion or its memorandum denying rehearing. Instead, the Ninth Circuit relied on *Locricchio v. Legal Services Corp.,* 833 F.2d 1352 (9th Cir.

1987) and *Lum v. City and County of Honolulu*, 963 F.2d 1167 (9th Cir. 1992). App. 10a; 200 F.3d at 1243. Neither *Locricchio* nor *Lum* concerned the issue of qualified immunity, and neither involved a situation where the defendant had the permissive right to appeal from the denial of a pretrial motion. Instead, both *Locricchio* and *Lum* involved the more common scenario where a nongovernmental defendant seeks but is denied summary judgment. Under those circumstances it could well be that, for policy reasons, reviewing courts will not overturn a later jury verdict against that defendant based on the state of the evidence at summary judgment. *But qualified immunity cases are different.* As this court recognized in *Mitchell v. Forsyth*, qualified immunity serves to protect public officials from an award of damages, *and this concern remains after trial.* See *Mitchell*, 472 U.S. at 526-527. This court should resolve this clear split among the circuits.

II.

Application of a Proper Standard of Review Would Have Resulted in Reversal of the District Court's Pretrial Ruling Denying Qualified Immunity

Had the Ninth Circuit conducted a de novo review of the record as it existed before trial, it should have concluded that the officers' motion was improperly denied. This is so for at least three reasons.

First, the district court improperly relied on plaintiffs' *allegations* of racial animus in deciding there were triable issues of whether the vehicle code violations were pretextual reasons for an otherwise unlawful stop. App.

53a-54a. In so ruling, the district court erroneously focused on the officers' alleged subjective intent. As this court has held, "[s]ubjective intentions [of the officer] play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. U.S.*, 517 U.S. 806, 813 (1996). An officer's intent does not invalidate a search "as long as the circumstances, viewed objectively, justify that action." *Scott v. United States*, 436 U.S. 128, 138 (1979). From an objective standpoint, a reasonable officer would have stopped the vehicle for the three vehicle code violations. In addition, the officers observed: 1) three young males driving slowly with no apparent destination late at night; 2) the passenger, Cramer, looking back at them; 3) that plaintiffs' car was registered to a woman with an address out of the area; and 4) after buying gas, plaintiffs turned around to drive back in the direction from which they had just come. The totality of these circumstances provided legitimate and objective reasons to stop plaintiffs' car, even without the ~~ve~~hicle code violations.

Second, the district court found the existence of disputed facts related to the pat-down searches of the plaintiffs because the officers allegedly pointed their guns at plaintiffs. However, this court has observed on many occasions that traffic stops are fraught with danger; indeed, "According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. . . . [A] significant percentage of murders of police officers occurs when the officers are making a traffic stop." *Pennsylvania v. Mimms*, 434 U.S. 106, 110-111 (1977); see also *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The officers here could

reasonably believe that unholstering their weapons during this traffic stop was lawful.

Finally, the officers could have reasonably concluded that it was necessary to search plaintiffs' car. A warrantless search of a car is valid if based upon probable cause. *California v. Acevedo*, 500 U.S. 565, 569-570 (1991). California Vehicle Code section 2806 states, in pertinent part: "Any . . . police officer . . . having reasonable cause to believe that any vehicle . . . is not equipped as required by this code or is in such unsafe condition as to endanger any person, may require the driver to stop and submit the vehicle . . . to an inspection and such tests as may be appropriate to determine the safety to persons and compliance with the code."

California Vehicle Code section 24252, subdivision (a) provides that all "lighting equipment of a required type installed on a vehicle shall be maintained in good working order." Further, California Vehicle Code section 27315, subdivision (d)(1) states that: "[N]o person shall operate a private passenger motor vehicle unless that person and all passengers 16 years of age or over are properly restrained by a safety belt." Based upon the above California Vehicle Code sections, the officers could have reasonably believed that such a search was legal and reasonable. In addition, a search of the vehicle for weapons was justified in these circumstances. *Michigan v. Long, supra*, 463 U.S. at 1049.

Even if the officers lacked reasonable suspicion, they are still entitled to qualified immunity because they were not plainly incompetent and did not knowingly violate the law. In *Hunter v. Bryant*, 502 U.S. 224 (1991), this court

held that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' [Citation omitted.] This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." 502 U.S. at 229. In light of clearly established principles, the officers here could have reasonably believed that all phases of the traffic stop and searches were lawful. Therefore, even if the officers mistakenly concluded that reasonable suspicion was present, they were still entitled to qualified immunity because their conclusion was not plainly incompetent, nor did they knowingly violate the law. Both the district court and the Ninth Circuit erred in holding otherwise.

III.

The Undisputed Evidence of Juror Misconduct Deprived the Officers of a Fair Trial Under The Sixth and Seventh Amendments.

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), this court set forth the standard governing the granting of a new trial when jurors are dishonest in pretrial questioning. As this court held: "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

As a matter of law, the officers satisfied both prongs of the *McDonough* test. First, two jurors (Eggert and Wilhite) failed to divulge on voir dire that they had significant, *negative* past incidents with the police: An officer pushed Eggert up against a van in an altercation in a restaurant parking lot, and Wilhite was on a "ride-along" program where he observed officers swearing at a detainee and then ripping out a radio from a car and pouring beer into the trunk.[4] Moreover, it was undisputed that, had the officers' counsel known of the concealment on voir dire, they would have sought to challenge both Eggert and Wilhite for cause. App. 120a, 122a, 151a. And this concealment was then *compounded* when Eggert and Wilhite divulged these incidents for the first time *during deliberations*. App. 115a.

The Ninth Circuit dismissed this concealment and later divulgement with the following sentence: "The two jurors' past personal experiences were of a general nature, and involved only minor incidents that could not have prejudice [*sic*] the jury or influenced its decision." App. 39a; 200 F.3d at 1255. This conclusion is not supportable. The jurors' experiences were not of a "general" nature, because (just like plaintiffs' allegations) they involved negative incidents with the police. And, contrary to the Ninth Circuit's conclusion, the record in this

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[4] The Ninth Circuit's opinion failed to mention that Eggert's incident caused a lasting and negative impression on him. In fact, Eggert stated he was "surprised" that he was not dismissed from the jury. App. 142a-143a. Further, the Ninth Circuit's opinion did not specify the conduct Wilhite saw, stating only that he "witnessed improper police conduct." App. 37a; 200 F.3d at 1254.

case demonstrates that these incidents influenced the jury's decision. Eggert told the other jurors that he could identify with a 17-year-old victim of police misconduct, and Wilhite stated that the other jurors appeared swayed by this revelation. App. 134a-135a. And this is *in addition* to the undisputed evidence that Eggert and Wilhite told the other jurors about their negative police experiences in deliberations.

Since there was a direct and rational connection between the extraneous information concealed and then introduced into deliberations and an adverse verdict, the juror misconduct directly related to material aspects of the case. *United States v. Bagnariol*, 665 F.2d 877, 884-885 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

The Ninth Circuit's determination that extrinsic evidence "could not have" prejudiced the jury cannot be supported. The undisputed evidence compels the conclusion that juror misconduct deprived the officers of a fair trial.[5]

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[5] In the Court of Appeals, the officers also contended they were denied a fair trial "because the district court [Judge Letts] conveyed to the jury that it did not believe their testimony and that it held an unfavorable view of them." App. 31a, 200 F.3d at 1252. The Ninth Circuit disagreed, concluding "[t]he record does not suggest actual bias nor does it suggest the district court did anything but conduct a fair and impartial trial." App. 35a, 200 F.3d 1253. However, based also on conduct in this case that was *not* before the Ninth Circuit, another district judge has since concluded that "Judge Letts maintains a personal bias and prejudice against the City of Torrance, including members of its police department." *Padilla v. City of Torrance*, No. CV-00-1634-JSL (C.D. Cal., April 6, 2000), Order on Motion to Disqualify, at 2.

CONCLUSION

The Ninth Circuit has created a clear split among the circuits. And admitted juror misconduct tainted the fact-finding process and deprived defendants of a fair trial. For either or both of these reasons, this petition should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARILYN PRICE, Guardian Ad Litem for LOHREN PRICE, CHERYL CRAMER, Guardian Ad Litem for DANIEL MASON, and NICOLE CRAMER, Guardian Ad Litem for NICHOLAS CRAMER, *Plaintiffs-Appellees,* v. ALBERT KRAMER, STEPHEN D'ANJOU, JOSEPH DELADURANTEY, and CITY OF TORRANCE, *Defendants-Appellants.*	Nos. 97-58580 98-55484 D.C. No. CV-06506-JSL OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
June 7, 1999-Pasadena, California

Filed January 11, 2000

Before: Dorothy W. Nelson, Stephen Reinhardt, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

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OPINION

REINHARDT, Circuit Judge:

Three teen-age boys, two African-American and one white, brought a civil rights lawsuit in federal district court alleging that City of Torrance police officers illegally stopped their vehicle, conducted an illegal search of their car, and used excessive force in searching them, causing them bodily injury. They also alleged that the officers' conduct resulted from racial bias. The jury found in favor of the plaintiffs and awarded them $245,000 in compensatory and punitive damages. The defendants in the case, City of Torrance police officers Albert Kramer and Stephen D'Anjou, the City of Torrance, and the Torrance Police Chief, appeal the judgment below. We reverse the district court's failure to dismiss, the City of Torrance and the Torrance Police Chief from the action. We affirm the district court's judgment in all other respects.

FACTUAL BACKGROUND

To understand the events that follow, one needs to know a bit about the geography and demographics of the

Los Angeles metropolitan area. The principal city is the City of Los Angeles. There are a number of smaller communities, some incorporated, some unincorporated, that adjoin or even fall within the territory that comprises the City of the Angels, as Los Angeles is sometimes fondly called. Beverly Hills, for example, is completely surrounded by Los Angeles, and Santa Monica partially so. The City of Torrance adjoins Los Angeles along most of Torrance's eastern border, while parts of Los Angeles lie both north and south of the smaller municipality. A person going from his home in Los Angeles to work or to school in another part of the city may pass through one or more other cities including Torrance, or through unincorporated areas, or both. According to the 1990 Census, Torrance is a predominantly white community, in which blacks comprise only 1.5 percent of the population. By comparison, in the City of Los Angeles, the majority of the population is non-Caucasian, and 15 percent is black. The law enforcement needs of some of the communities in the Los Angeles area, both incorporated and unincorporated, are served by the Los Angeles County Sheriff's Department. The City of Los Angeles and the City of Torrance, however, each has its own police department.

On May 27, 1994, Lohren Price, Daniel Mason, and Nicholas Cramer, all seventeen-year-olds, attended their last day of prep school at Harvard-Westlake Preparatory School in Los Angeles. That evening, the boys decided to celebrate their graduation by going to see the Eddie Murphy movie *Beverly Hills Cop 3*. After the movie let out, they drove south toward Mason's house. They took Crenshaw Boulevard, a major north-south artery that runs through both Los Angeles and Torrance. Price and

Mason, who are black, were in the front seat of Price's mother's car, a 1979 Chevrolet. Cramer, who is white, was lying down on the back seat because he was tired. The boys were having fun, discussing the colleges they planned to attend and reminiscing about high school, so they decided to pass Mason's home and cruise around to talk some more before returning home for the night. At some point, Price realized that they needed gas and that they would have to stop at a service station along the way.

The boys continued to drive south on Crenshaw Boulevard. In doing so, they left Los Angeles and ended up in Torrance, without attaching any particular significance to that fact. They were approximately seven to ten minutes away from Price's and Mason's homes in Los Angeles, and barely within the municipal boundaries of Torrance when still headed southbound on Crenshaw, they stopped at a red light. A City of Torrance patrol car was stopped at the opposite traffic light, headed northbound on that same boulevard. After the light changed, the two vehicles passed each other. At trial, Officer Kramer admitted that when the cars passed, he saw only the two black teens, Price and Mason; Cramer, the white teen, was not visible to the officers. The patrol car immediately made a U-turn, accelerated to catch up, and then proceeded to follow Price's vehicle from approximately two car lengths behind.[1]

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[1] Officer Kramer testified that Officer D'Anjou, who was driving, made the U-turn without explaining to Kramer his reason for doing so, and Kramer did not ask for a reason. Officer D'Anjou testified that he did not recall making the U-turn. He

The boys noticed that the patrol car had turned around and was now following them.[2] Price proceeded to drive within the speed limit, at 30-35 mph. Cramer, who had been dozing in the backseat, sat up and looked out the rear window. Price continued on to a Chevron station a few blocks ahead. He slowed down, applied his right-turn signal, and carefully entered the station. Price and Mason discussed taking particular pains not to make any sudden or precipitous moves that might raise the suspicions of the police officers. The patrol car also entered the station and stopped behind the boys at the pump where they were getting gas. The patrol car first parked perpendicular to Price's car, where the officers waited, staring directly at the newly graduated students. The officers then drove around, parked parallel to their car, and continued to stare. The officers next pulled out of the station and went to a parking lot across Crenshaw, where they sat, continuing their surveillance. By this time, the boys had become concerned about the officers' behavior, and they decided to go home. They pulled out of the gas station, turned onto Crenshaw, and headed northbound

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did recall speeding up to follow the vehicle, and explained his reason for doing so was that "it was the only car on the street."

[2] At this point, the officers ran a check on Price's license plate. The officers testified that the check came back and that the car was registered to "a woman from an area other than Torrance." The "woman" was Price's mother, Marilyn Price. The car was registered to Marilyn Price at the family's address in Los Angeles, which was the same address shown on Price's driver's license. Officer Kramer testified that he did not know where this address was located, only that it was in Los Angeles and not in Torrance.

out of Torrance and back toward Mason's home in Los Angeles.

The officers pulled onto Crenshaw to follow the boys' vehicle. The patrol car ran a red light and caught up with the boys' car. While still behind it, the officers turned on their flashing lights. Price did not think that he had done anything wrong, but pulled over immediately. At trial, the officers testified that they made the stop because of a defective taillight and seatbelt violations. Officer Kramer testified that he first observed these traffic violations after the boys' car left the gas station and started heading north up Crenshaw. The plaintiffs argued that for various reasons it was evident that the defective taillight violation was completely fabricated. They acknowledged that two of the boys were not wearing their seatbelts, but asserted that the officers could not have known that fact until after stopping Price's car.[3]

Officer D'Anjou came to the driver's side of the car with his gun drawn and pointed directly at Price. Officer Kramer approached from the other side and pointed his gun at Mason's head. Mason could see D'Anjou's gun out of Price's window and Kramer's gun out his own. Officer D'Anjou asked Price for his driver's license and registration which Price handed him.

The teens were taken out of the car one at a time, and, while Officer D'Anjou kept his gun pointed at them, Officer Kramer conducted a pat-down search of each boy. Officer Kramer weighed 300 pounds and could bench

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[3] The citations for these alleged traffic violations were all subsequently dismissed by the Juvenile Court.

press nearly 500 pounds. Officer Kramer told each boy to lock his hands together behind his head. He then gripped the teens by their hands and 'forcefully yanked their bodies backwards onto the curb. During the ensuing search, Officer Kramer grabbed each boy's testicles, pulled down on and then forcefully squeezed them. All three boys experienced severe pain, including nausea and extreme soreness. In each case, the sharp pain lasted throughout the questioning which followed. Mason explained, "my throat had swollen up, it felt like I swallowed a grapefruit, I had this tremendous pain in my stomach, I wanted to throw up, and I was just trying to . . . answer these questions."

Officer Kramer separately asked Price and Mason, the two African American teens, "What are you doing out here?" The questions that Officer Kramer asked Nicholas Cramer, the white teen, were of a very different character. He asked Cramer, "Do you know the two men in the car with you?" Cramer answered, "Of course." The officer next asked Cramer if the other two boys were his friends. Cramer answered, "Yes." Officer Kramer then questioned Cramer as to how long he had known the two young blacks.

Following the questioning, the boys were instructed to sit on the curb. While they were seated there, Officer D'Anjou kept his gun trained on them and instructed them not to speak to each other. Officer D'Anjou taunted Mason by aiming his gun at him and remarking, "You look like you have something on the tip of your tongue that you want to say, why don't you say it."

Meanwhile, Officer Kramer searched Price's car. He never asked permission to search the vehicle, and questioned Price only as to where his car keys were. Having obtained the keys, Officer Kramer searched the front seat, the glove compartment, the back seat, and underneath the front seat. He then opened the hood of the car, searched in the engine compartment, and opened the trunk. In the trunk, he found a box of papers belonging to Marilyn Price. He emptied out the contents of the box and rummaged through them. Officer Kramer then tested all the lights on the car. After the search failed to turn up any evidence of wrongdoing, Officer D'Anjou gave Price a citation for "inoperative turn signals" and for not wearing his seat belt. Officer Kramer issued a citation to Nicholas Cramer for not wearing a seat belt. He told Mason "You're not supposed to be here." The boys were then told to "get the hell out of here." Before leaving, Mason tried to look at the officers' name tags and badge numbers, and was able to get both their names. The stop lasted approximately one hour.[4]

After going home, each boy promptly told his parents about the incident. The three families acted immediately. One plaintiff's father was an Assistant City Attorney for the City of Los Angeles and another's father was a lawyer at one of Los Angeles's oldest and largest

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[4] Because after hearing all the testimony from both sides, the jury awarded the plaintiffs a verdict in the amount of $245,000, including punitive damages, we set forth the version of the facts upon which the plaintiffs sought relief, and which support the jury's verdict. Our review of the record gives us no reason to doubt the truthfulness of the plaintiffs' assertions or the correctness of the verdict in their favor.

law firms, while the mother of one of the plaintiffs had been a Probation Officer for over ten years. The day after the incident, Cramer's father, the assistant city attorney, wrote a letter of complaint to the Torrance Chief of Police. That day, Mason's father went with his son to the Torrance Police Department and filed a formal complaint. The three families also immediately retained a lawyer, who subsequently filed this lawsuit in federal district court.

The defendants appeal the judgment in plaintiffs' favor, entered after a trial before a jury. The defendants argue that the judgment should be reversed for several reasons: (1) an erroneous pretrial order denying defendants summary judgment on the basis of qualified immunity; (2) the district court's failure to grant the defendants qualified immunity after the conclusion of the testimony at trial; (3) the erroneous admission of evidence concerning racial bias; (4) the admission of improper lay opinion testimony; (5) juror misconduct; (6) the district court's failure to conduct an impartial trial. In addition, the City of Torrance and the Torrance Chief of Police urge that the district court erroneously failed to enter judgment in their favor after the plaintiffs abandoned all claims against them. Only the latter point has merit.

ANALYSIS

I. Post-trial appal of pre-trial denial of qualified immunity

The defendants argue that the district court's pretrial order denying the officers qualified immunity was improper. We do not reach the merits of this claim,

because the issue is not reviewable on this appeal. In *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987), we announced the rule that "the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits." *Id.* at 1359; *see also Lum v. City and County of Honolulu*, 963 F.2d 1167, 1170 (9th Cir. 1992). The *Locricchio* court explained the rationale behind refusing to overturn a jury verdict on the basis of the evidence and arguments that existed before trial:

> To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial.

Locricchio, 833 F.2d at 1359. For good reason, *Locricchio* now reflects the prevailing view among the federal circuits.[5]

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[5] *Lama v. Borras*, 16 F.3d 473, 476 n. 5 (1st Cir. 1994); *Pahuta v. Massey-Ferguson*, 170 F.3d 125, 130 (2d Cir. 1999); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1237 (4th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 570-71 (5th Cir. 1994); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277 (7th Cir. 1994); *Metropolitan Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 354 (8th Cir. 1997); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250-51 (10th Cir. 1992); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1569 (Fed.Cir. 1986).

We see no reason to deviate from *Locricchio* in the present context. In fact, there is even less reason to permit a post-trial appeal of a pretrial denial of qualified immunity. In qualified immunity cases, unlike almost all others,[6] a denial of a motion for qualified immunity as a matter of law is appealable as of right on an interlocutory basis. *Behrens*, 516 U.S. at 313; *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Defendants thus have multiple opportunities to appeal a denial of qualified immunity before the final judgment. *Behrens*, 516 U.S. at 307-10. Of course, "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case . . . [S]ummary judgment determinations are appealable when they resolve a dispute concerning an abstract issu[e] of law' relating to qualified immunity." *Id.* at 313 (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)). In the present case, the defendants did not avail themselves of their right to an interlocutory appeal of the pre-trial ruling, if indeed they had one. Having failed to take

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[6] In *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) the Supreme Court identified the denial of a motion for qualified immunity as a matter of law as one of only a "small class" of district court decisions which, under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), are immediately appealable. *Behrens*, 516 U.S. at 305. The fact that a pre-trial ruling denying qualified immunity is in the *Cohen* category of cases supports the conclusion that such a ruling is not appealable after final judgment. In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), the Court explained that, for a decision to fit within the *Cohen* class of cases, it must be "effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct*, 506 U.S. at 144-45; *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

whatever timely opportunity existed, they now ask us to review the pre-trial qualified immunity order as though the subsequent trial and jury verdict had never transpired. Notably, during oral argument, defense counsel could not provide the court with a reason for their not having filed such an interlocutory appeal, aside from the fact that the time for doing so eventually elapsed. The defendants' complaint to us now – that in retrospect the officers should have been immune from suit at the time of the pretrial order – is long past due and unreviewable on this appeal.[7]

II. Appeal of final judgment

The defendants also contend that, after the presentation of evidence at trial, the district court should have issued a judgment as a matter of law granting the officers qualified immunity on all of the plaintiffs' claims. The plaintiffs' suit was based on allegations that the officers' wrongful conduct included: (1) an illegal stop; (2) an illegal search of the vehicle; and (3) the excessive use of force. The critical facts were in dispute. A judgment as a matter of law is appropriate when the evidence permits only one conclusion. *Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998). Here, the jury had sufficient evidence to permit it to conclude that the officers

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[7] Because we are reluctant to leave the impression that defense counsel may have forfeited important rights of their clients by their inaction, we note that our review of the record reveals that the defendants would not have prevailed had a timely interlocutory appeal been taken. At the least, there was a genuine issue of fact as to the relevant issues.

engaged in wrongful conduct that a reasonable officer would have known was unlawful in light of clearly established law. *See Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

A. Illegal Stop

Officers are not entitled to qualified immunity for stopping a vehicle without probable cause or reasonable suspicion, especially when the stop includes detention and interrogation at gunpoint. *Washington v. Lambert*, 98 F.3d 1181, 1192-93 (9th Cir. 1996) (denying qualified immunity on similar grounds). The officers, however, claim they had probable cause to stop the vehicle on the basis of the traffic code violations – the defective taillight and seatbelt violations – as well as because they had a reasonable suspicion that the boys were engaged in criminal activity.

1. Traffic code violations

The defendants claim that the officers legally stopped the plaintiffs' vehicle because of traffic code violations. However, at trial, the plaintiffs contended that the officers had fabricated the violations or only learned of them (e.g., the seatbelt violations) after the stop. The plaintiffs introduced sufficient evidence at trial to prove their claim. They also demonstrated significant inconsistencies in the officers' statements and the implausibility of some of the officers' explanations.

In terms of the defective rear light citation, the plaintiffs presented a witness who testified that the vehicle did not have any of the lighting problems that the officers claimed.[8] The plaintiffs also pointed to numerous problems with the officers' testimony. At the Juvenile Court hearing on the traffic citations, Officer Kramer testified that he and his partner returned to the gas station from their observation post across the street, followed the boys onto the street, and, from behind, saw the boys make a left turn onto Crenshaw, thus observing the inoperative left-turn signal. However, Kramer changed his story at trial and testified that the patrol car remained across the street and then pulled onto Crenshaw, at which time he noticed a burned out bulb in the taillight assembly.[9] Officer Kramer was impeached with his prior testimony.[10]

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[8] Price's uncle, who was a master mechanic and regularly worked on the car, testified at trial. He had inspected the vehicle before and after the incident and testified that it had none of the defects – whether an inoperative turn signal or a defective taillight – that officers described.

[9] During the Juvenile Court hearing, it was important, if not crucial, that Officer Kramer testify that he observed a left turn from behind the vehicle, because the citation was for an inoperative left-turn signal. In the district court proceedings, the officers changed their story claiming they observed a burned out taillight. This explanation was more conducive to their position because it meant the officers could have observed the lighting defect simply by traveling behind the car. The citation, however, was clearly for an inoperative left-turn signal: That defect could not have been observed had the police car been located where Kramer testified it was in his district court testimony.

[10] "Among other things, Officer Kramer also made inconsistent statements regarding his and his partner's actions

Officer Kramer's explanation for the discrepancy: "That's what I testified to originally, sir, but I realized that I was wrong." Officer Kramer stated that he must have "made a mistake and confused this with another set of circumstances involving a traffic stop." At trial, when asked whether he was aware that Price was cited for a defective turn signal and not for a defective taillight, Officer Kramer replied he was not aware of that fact.

Officer D'Anjou testified that when he was first following the boys south on Crenshaw, he noted that one of the taillights – not a turn signal – was out. He admitted that, in performing his duties, he makes a distinction between a taillight and turn signal. He tried to explain that he had written the citation for an inoperative turn signal "because when it gets checked by the marshals or highway patrol, whoever they have it signed off with, they're going to look at that turn signal assembly to make sure the lights work."

The officers' testimony concerning the seatbelt violation was also troubled by inconsistencies and contradicted by the plaintiffs' testimony. At trial, the officers testified that they pulled the patrol car alongside Price's car to examine his facial reaction and to look inside the vehicle to see whether the occupants were wearing their seatbelts. However, the plaintiffs testified that the officers

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when the boys initially entered the gas station. At trial, he stated that the patrol car had first followed the Chevrolet directly into the gas station to verify the car's license plate. Earlier, however, in the Juvenile Court proceedings, he had testified that the patrol car first parked in the lot across the street, rather than following the boys into the gas station.

never pulled alongside their car. Even more damaging to the defendants, Officer D'Anjou had testified at his deposition that the patrol car never pulled alongside the boy's vehicle. At trial, the officers also claimed they could see that the boys were not wearing their seatbelts when the patrol car was initially following their vehicle from behind. The plaintiffs contended that this was simply not credible, given that the officers were two car lengths behind them and it was nighttime. The jury's judgment reflects that it believed the plaintiffs' explanation.

2. Reasonable suspicion of criminal activity

In the alternative, the defendants claim the stop was legal because a combination of factors provided them with reasonable suspicion of criminal activity. The defendants' arguments, however, substantially rely either on facts directly disputed by the plaintiffs' testimony or on factual allegations that were contradicted or undercut by their own testimony. As we discuss below, the remaining factors that the defendants cite, whether taken together or separately, are either improper or inadequate for purposes of establishing reasonable suspicion. "[A] showing of reasonable suspicion . . . is 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' " *United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th. Cir. 1999) (quoting *U.S. v. Cortez*, 449 U.S. 411, 417 (1981)). Moreover, the entire theory that the officers stopped the car based on reasonable suspicion due to a number of related factors controverted their principal defense, namely, that they stopped the vehicle for a defective taillight and seatbelt violations. Hence, the

jury could well have weighed these inconsistencies when evaluating the credibility of the defendants' rendition of events.

The defendants claim, for example, that one factor establishing reasonable suspicion was that the boys made a sudden turn into the gas station. However, the factual predicate underlying this claim was disputed during the trial. The officers' story was directly contradicted by the plaintiffs' testimony that Price made a slow and deliberate turn into the station so as not to elicit the officers' concern. The jury may well have believed the plaintiffs.

The defendants also claim that the boys' decision to pass up a Shell station before entering the Chevron station shortly afterwards provided a basis for reasonable suspicion. In the age of brand-names, however, there is nothing unusual, as Price explained at trial, in the fact that he preferred to shop at Chevron, instead of Shell. Furthermore, at trial, Officer D'Anjou admitted that, if the boys had actually turned into the first station, that might have been more suspicious. He conceded that turning into the first station might have appeared more evasive, because that would have terminated even more precipitously the officers' opportunity to observe whatever conduct the boys were engaged in.[11]

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[11] The officers also claimed that they found it suspicious that the boys had already passed a Thrifty gas station which was located significantly up Crenshaw Boulevard. Under direct examination, however, the officers conceded that they had no way of knowing whether the boys had entered onto Crenshaw Boulevard prior to the Thrifty station and thus whether they even had the opportunity to consider that "fact."

The officers claim that their suspicion of criminal activity was also based on the fact that the boys were driving five to ten miles below the speed limit. Not only does that speed not appear to be excessively slow, but the officers became aware of the boys' rate of travel only after the patrol car made a U-turn and then caught up with their vehicle. As the district court's interchange with Officer D'Anjou suggested, reasonable suspicion cannot be based on the fact that a car is traveling at a speed five to ten miles under the limit, even if the driver slows down to that speed once he notices a police car behind him.[12]

More surprisingly, at trial, the defendants also suggested that the fact the boys were not driving *over* the speed limit was a valid ground for suspecting criminal activity. We might understand that certain legal activity – perhaps driving far below the speed limit – may under some circumstances be cause for reasonable suspicion. However; we reject the argument that not driving in

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[12] Another factor the defendants improperly cite as a basis for reasonable suspicion is the fact that once the officers began to follow the boys' vehicle, "the passenger, Cramer, look[ed] back at them." Again, this type of reaction does not constitute a basis for suspicion of criminal wrongdoing. Rather, it reflects a normal response that any driver or passenger might have when a police car does a U-turn and then begins to follow him. *See Washington v. Lambert*, 98 F.3d 1181, 1191 (9th Cir. 1996) (The fact that an individual "looked at [police officer] and looked away a few times inside a restaurant did not make it more likely that [he] was a criminal. . . . It is also a fact that many innocent black men, and even many innocent white men, will appear nervous when they notice that they are being followed by the police. . . . ").

excess of the speed limit can constitute such cause. We would do so even if a driver were not aware that he was being followed by a police car. Moreover, we note that had the boys driven at a rate that exceeded the speed limit, the officers certainly could have cited that factor as a basis for a traffic stop. Thus, were we to accept the factor, we would probably have to conclude ultimately that all driving – over, at, or below the speed limit – is suspicious or subject to police stops.

The defendants also suggest, as additional factors for reasonable suspicion, that the three young men were traveling in a high crime area known for "gang activity." First, the district court, after determining that the defendants' potential testimony regarding gang activity was prejudicial and without foundation, precluded the introduction of such evidence. The defendants do not challenge that evidentiary ruling on appeal. They, therefore, cannot rely on that factor now. Second, whether the location was a "high crime area" was disputed. At trial, the officers first stated the location the boys were driving through was such an area. Under direct examination, however, Officer D'Anjou admitted that it could not be called a "high crime area" relative to Los Angles [sic] County; that in fact it was a relatively low crime area in that regard. He explained, instead, that it was a "high crime area" for the City of Torrance. He also admitted that the boulevard along which the boys were traveling was a major thoroughfare. Under these circumstances, the jury could have reasonably concluded that the fact that the three young men were driving in an otherwise unsuspicious manner on Crenshaw Boulevard was not a factor that could give rise to reasonable suspicion. *Cf.*

U.S. v. Mallides, 473 F.2d 859, 861 n.3 (9th Cir. 1973) ("That innocent activity occurs in a high crime area provides no basis for converting innocuous conduct into suspicious conduct.").

The remaining facts, relied on by the officers, are that the car in which the boys were driving was registered to a woman with an address outside the city limits of Torrance, and that after buying gas under the watchful eyes of the Torrance police department the three young men decided to head back home to Los Angeles. These facts, when considered with the other factors we have discussed, do not give police officers license to stop a vehicle. These are the kinds of purely innocent acts which, if made the basis for reasonable suspicion, would leave most [sic] any group of youths vulnerable to being stopped at the whim of the police. Surely, after hearing the testimony in this case, the jury could have reasonably concluded that the officers did not have "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417. "Unless there is 'at least articulable and reasonable suspicion . . . that either the vehicle or its occupant is . . . subject to seizure for violation of law,' such a stop is unreasonable under the Fourth Amendment." *United States v. Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985) (quoting *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).

We recognize that, in some circumstances, wholly innocent acts, when taken together, may give rise to reasonable suspicion. *See United States v. Sokolow*, 490 U.S. 1, 9 (1989) ("Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to

reasonable suspicion."). In this case, however, the wholly innocent acts, when viewed cumulatively, give no more rise to reasonable suspicion than they do individually. Moreover, some of these "factors" may not be considered under any circumstance: for example, the fact that the vehicle was not exceeding the speed limit. In light of the above, a reasonable jury could readily have concluded that the officers' decision to stop the plaintiffs' vehicle did not meet the standard of reasonable suspicion.

Finally, the jury could have concluded that the officers stopped the boys' car on account of racial animus. As we discuss more fully below, the plaintiffs presented sufficient evidence at trial to support such a conclusion. The defendants do not contend that, if the allegations of racial bias are true, they should be entitled to qualified immunity.

B. Warrantless search of vehicle

The defendants contend that two reasons justified the warrantless search of the vehicle without Price's consent: (1) a search of the car's equipment was justifiably related to the vehicle code violations; (2) a search for hidden weapons was justified by the possible threat to the officers' safety.[13] The first contention is easily resolved. As already explained, the plaintiffs argued that the officers fabricated the traffic code violations. The jury could have

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[13] The defendants also claim that Price gave his consent for the vehicle to be searched. However, the plaintiffs' testimony directly refuted that allegation and the jury could have easily found the plaintiffs' account more credible.

easily believed the search was therefore not based on any vehicle code offense, but, as the plaintiffs contended, on an unwarranted attempt to find something incriminating. Moreover, according to the plaintiffs' evidence, the search also proceeded to areas of Price's car – e.g., emptying a box of papers in the trunk of the car – that had no plausible connection to the vehicle code violations.

Relying on *Michigan v. Long*, 463 U.S. 1032 (1983), and *Terry v. Ohio*, 392 U.S. 1 (1968), the defendants also claim that they had the legal right to search the vehicle for weapons due to the existence of a potential threat to the officers' safety. The plaintiffs argue that the defendants waived this argument by not raising it before the district court, and the defendants make no response to that contention. The record reveals that the defendants did not make the argument before the district court. Rather, they argued that the search was lawful for an entirely different reason: they asserted that the search was conducted in order to look for contraband or evidence of a crime. In their closing argument, defense counsel explained: "What was this search about? Officer[sic] told you what this search was about; there was suspicious activity, they wanted to see if there were any tools of a crime in the car."[14] Moreover, the district court's jury instructions

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[14] Notably, neither *Long* nor *Terry* supports a search for evidence of a crime: "Nothing in *Terry* can be understood to allow . . . any search whatever for anything but weapons." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) ("If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*"); *Adams v. Williams*, 407 U.S. 143, 145 (1972) ("The purpose of this limited search is not to discover

corresponded to the arguments the defense counsel made and thus did not include an explanation of the *Michigan v. Long* justification for a vehicle search for weapons. The defendants did not object to the jury instructions at trial nor do they try to challenge the instructions on appeal. Having failed to make the officer safety argument to the jury and having failed to object to the jury instructions, which offered an entirely different justification for the search, the defendants cannot raise the officer safety argument on appeal. *Hawaiian Rock Prods. v. A.E. Lopez Ents.*, 74 F.3d 972, 976 (9th Cir. 1996).

C. Excessive use of force

The plaintiffs' excessive use of force claim is easily resolved. The defendants do not contest the fact that, if the jury believed the boys' account of the physical abuse they suffered, the officers should be held liable for violating their Fourth Amendment rights. Regardless of any legal justification for a pat-down search, the police officers could not be justified in causing the boys extreme pain by deliberately grabbing, pulling, and squeezing their testicles. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The plaintiffs provided the jury with sufficient evidence to support the conclusion that the officers had

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evidence of crime, but to allow the officer to pursue his investigation without fear of violence."); *Long*, 463 U.S. at 1052 n.16.

engaged in this conduct – conduct that clearly lies outside the protective realm of qualified immunity.[15]

* * *

A substantial part of the defendants' argument that they should have been entitled to qualified immunity depends on accepting their version of events and rejecting the plaintiffs' testimony and other contrary evidence. The plain fact is that the plaintiffs presented the jury with sufficient evidence to justify the conclusion that the defendants' actions were such that no reasonable officer would have considered the conduct lawful in light of clearly established law. The jury had the right to accept the plaintiffs' testimony and reject the defendants'. Indeed, the district court would have committed reversible error if it had granted the defendants qualified immunity as a matter of law.

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[15] The officers raise one evidentiary issue related to the excessive force claim. As a brief aside in the midst of other arguments, the defendants' brief contends that the district court erroneously prevented Officer Kramer from physically demonstrating to the jury his technique for pat-down searches. The defendants, however, do not argue that the district court's ruling was prejudicial, nor could they persuasively make such a claim. Officer Kramer was allowed, on two occasions, to describe, in graphic detail, his method of conducting a pat-down search. The district court's decision to limit his testimony to a verbal description of his technique rather than also permitting him to give a physical demonstration is not a reversible error; in fact, it is not error at all. It is highly doubtful that the officer's demonstration would have added anything, and the defense never explained how it might have. The court's ruling was not an abuse of discretion and could not have possibly affected the outcome of the proceedings.

III. Racial Bias

The defendants also contend that the jury was unfairly prejudiced, because the plaintiffs "deliberately dragged the highly emotional specter of racism into the case." The defendants object both to the adequacy of the notice that racial bias would be put in issue and to the prejudicial nature of the evidence introduced. In terms of timing, the defense was given more than two years advance warning before the first day of trial. On February 24, 1995, the plaintiff's Second Amended Complaint included racial bias as one of the claims. On February 5, 1996, the Pretrial Conference Order specifically incorporated the Second Amended Complaint and included language regarding callous and malicious conduct that encompassed the issue of racial bias. Four days later, the district court's Pretrial Order on the "Defendants' Motions in Limine" squarely rejected the defendants' argument that racial bias had been entered too late. *See Miller v. Safeco Title Insurance Co.*, 758 F.2d 364, 368 (9th Cir. 1985) (permitting admission of issues "embraced within . . . language" of pre-trial order and subsequently approved by the district court). We have stated that "[l]eave to amend is generally within the discretion of the district court." *Nelson v. Pima Community College*, 83 F.3d 1075, 1079 (9th Cir. 1996). "In exercising this discretion, a court must be guided by the underlying purpose of [Federal Rules of Civil Procedure] Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities. Accordingly, Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.' " *Eldridge v. Block*, 832 F.2d 1132, 1135

(9th Cir. 1987) (citations omitted). Even without this liberal application of Rule 15, the defendants' argument fails. The defendants cannot reasonably claim that they were "substantially prejudice[d]" by the timing of the amended pleadings. *Consol. Data Terminals v. Applied Digital Data Sys.*, 708 F.2d 385, 396 (9th Cir. 1983); *Duggan v. Hobbs*, 99 F.3d 307, 313 (9th Cir. 1996). They had more than two years advance notice, and, from the record, there is no reason to believe that they were unprepared to defend against the allegation of racial bias.

The defendants' arguments that the evidence regarding racial bias was unfairly prejudicial are rather surprising because they themselves were the first to elicit testimony regarding the issue of racism. During direct examination of Mason, the first plaintiff to take the stand, race was not mentioned. Early into cross-examination, however, the defense counsel asked Mason: "Isn't it true that its part of your problem that you didn't believe these police officers actually had a reason to pull you over, other than to give you a hard time" and "that's part of what causes your anger and emotional problems." Mason replied, "Not particularly. That's something that has been with me my whole life, it's an unfortunate thing that young black people have to accept as part of their life." Defense counsel did not object to this answer or seek to have it struck as non-responsive. Astonishingly, the defendants' brief quotes this passage to exemplify what it considered objectionable instances of "injecting allegations of racial bias into a trial," even though it was the defense counsel who asked Mason the question and accepted the answer. Later in the cross-examination of Mason, defense counsel also asked: "And isn't it true that

at this point when you were at the gas station . . . and they were circling around you and looking that you had already believed that your race may have something to do with this?" Mason predictably responded, "Yes."[16] It should be no surprise that "Appellants may not seek reversal on the basis of their own evidentiary errors." *United Sates v. Miller*, 771 F.2d 1219, 1234 (9th Cir. 1985).

Later in the trial, Mason's mother and Price's mother took the stand and the plaintiffs' counsel asked them related questions. The attorney introduced these questions by asking Mrs. Mason about the "topic touched upon by your son in his testimony." The attorney asked Mrs. Mason whether she instructed her son about actions he should take if he were followed or stopped by the police. Mrs. Mason testified that she and her husband told their son that "when he is being watched or followed to simply continue doing what he is doing, that he can't prevent them from doing that necessarily, but that he should at all times be respectful and follow their instructions." The plaintiffs' counsel then asked Mrs. Mason "why have you and your husband instructed your son in this subject [of what to do if followed or stopped by police officers]?" Mrs. Mason replied, "it is my both belief and experience that young males, and in particular in our culture young black males are stopped frequently . . . My sons, both of them, have been stopped frequently, sometimes for violations, sometimes not." Lohren Price's mother testified similarly: "I told [Lohren] that as an

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[16] Given the record, we fail to understand the claim the defendants make in their reply brief, namely, that "Defendants' counsel did not ask Plaintiffs any question related to race."

African-American he is targeted, that he will be stopped by the police, but when he is stopped by the police he is to be cooperative, polite . . . " The questions and answers were important, including the statements about race made by Daniel Mason in response to defense counsel's questions, because they helped to explain the boys' state of mind at the time of the incident, and why they responded the way they did. The exchanges served to make the boys' answers more credible and to counter the defendants' contention that, if the youths were truly subject to excessive force or other abuse, they would have been more agitated or have complained to the officers.

Regardless of who first introduced the issue, racial bias was an obvious and appropriate subject to explore given the nature of the case. In closing arguments, it was appropriate for the plaintiffs' counsel to tell the jury it could infer racial bias from all of the circumstances. The first such circumstance was the fact that when the officers first decided to make a U-turn and follow the plaintiffs' car, all they had seen were two young African American males driving down a major boulevard in an unremarkable manner. The next circumstance it was appropriate to ask the jury to consider was the questions directed by Officer Kramer to the white teen, Nicholas Cramer. The officer asked Cramer whether he knew the two black teens, whether they were actually his friends, and how long he had known them. No comparable questions were asked of the black plaintiffs. Instead, Kramer asked Price and Mason, the two African American teens "What are you doing out here?" The officer also told Mason "You're not supposed to be here." In leaving, the officers' last words to the boys were, "Get the hell out of here." The

plaintiffs' counsel appropriately introduced testimony to prove these facts and, on that basis, appropriately urged the jury to draw the inference that the officers had acted on racial bias.

The relevance of the subject of racial bias is readily apparent, for several reasons. First, proving the officers' actions were racially motivated could explain why they stopped the boys' vehicle without probable cause or reasonable suspicion and also why they used excessive force without cause. Establishing the officers' racial motivation tends to demonstrate why the plaintiffs' testimony, and not the officers', should be deemed credible by the jurors. That is, it explains why the officers might have lied about the events in question. Finally, racial bias was important to proving the defendants conduct was "malicious, wanton or oppressive or in reckless disregard of the plaintiffs' rights" which, according to the jury instructions, was necessary to the receipt of punitive damages. The defendants' argument that race was introduced into this case improperly is without merit.

IV. Evidentiary objections

The defendants contend that the district court made two erroneous evidentiary rulings. First, the defendants argue that the court erroneously precluded the introduction of evidence on the issue of excessive force. Specifically, as a brief aside in the midst of other arguments, the defendants' brief contends that the district court erroneously prevented Officer Kramer from physically demonstrating to the jury his technique for pat-down searches. The defendants, however, do not argue that the

district court's ruling was prejudicial, nor could they persuasively make such a claim. Officer Kramer was allowed, on two occasions, to describe, in graphic detail, his method of conducting a pat-down search. The district court's decision to limit his testimony to a verbal description of his technique rather than also permitting him to give a physical demonstration is not reversible error; in fact, it is not error at all. It is highly doubtful that the officer's demonstration would have added anything, and the defense never explained how it might have. The court's ruling was not an abuse of discretion and could not possibly have affected the outcome of the proceedings.

Second, the defendants argue that certain statements by some of the witnesses constituted "lay opinion testimony" in violation of Rule 701 of the Federal Rules of Evidence. However, the defendants never objected to the testimony on the basis they now seek to raise. Specifically, they did not ask the district court to preclude the testimony in question as lay opinion testimony.[17] Accordingly, the defendants' argument is waived. *Marbled Murrelet v. Babbit* [sic], 83 F.3d 1060, 1066 (9th Cir. 1996) ("By failing to object to evidence at trial and request a ruling on such an objection, a party waives the right to raise

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[17] Admittedly, defense counsel objected to testimony by Cramer and his father, but this was on the ground of lack of relevance, not on the basis of it being improper lay opinion testimony. The fact that the defendants made the other evidentiary objection at trial does not preserve the objection they failed to make.

admissibility issues on appeal."); *Fenton v. Freedman*, 748 F.2d 1358, 1360 (9th Cir. 1984).[18]

V. The district court's conduct of the trial.

The defendants contend that the district court conveyed to the jury that it did not believe their testimony and that it held an unfavorable view of them. On this, basis, the defendants argue they were denied a fair trial and the jury's verdict should be reversed. Federal judges are granted broad discretion in supervising trials, and a judge's behavior during trial justifies reversal only if he abuses that discretion. *United States v. Greene*, 698 F.2d 1364, 1375 (9th Cir. 1983). A judge's participation during trial warrants reversal "only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality." *United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988); *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999). The record here, however, clearly shows that the defendants' allegations are without foundation.

The appellants primarily focus on two allegations of judicial impropriety. First, they contend that the district court improperly stated in open court that no evidence existed to show the officers had permission to search the

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[18] Even if the argument had not been waived and the admission of the evidence was erroneous, we would not consider this a reversible error, because it was not prejudicial. Given the strength of the plaintiffs' case and the numerous problems with the officers' testimony, the admission of this testimony did not affect the outcome of the proceedings.

car. This was erroneous because Officer Kramer had previously testified that it was his habit and custom to ask individuals for permission to search their vehicles. The district court's comments, however, were insignificant and any adverse effect was effectively cured by the court's subsequent instruction. The statement in question was a short but confusing comment the court made in the course of precluding a line of questioning that called for a legal conclusion. Recognizing the potential concern, the district court issued a prompt and effective curative instruction. *See Laurins*, 857 F.2d at 538 (noting that curative instruction can alleviate potential perception of judicial bias). The appellants mischaracterize the court's curative instruction by claiming it still "conveyed the impression that the judge did not believe that the habit evidence was sufficient." On the contrary, the curative instruction explained, at length, the importance and potential sufficiency of the habit and custom evidence in proving consent to the search. The court acted in a neutral and appropriate manner by clarifying its earlier statement and by leaving the sufficiency determination open to the jury.

Second, the defendants contend that the district court inappropriately prevented defense counsel from asking a plaintiff why he chose to enter one gas station instead of another. However, defense counsel had already asked that question and received the same answer a number of times. The district court was acting well within its discretion to "prevent undue repetition of testimony." *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986). The defendants misrepresent the record by claiming that the court's comments conveyed the impression that the

choice of gas stations "was of no importance." First, the court's comments were clearly meant to prevent repetition, not to minimize the potential relevance of the question. Second, the defendants ignore the court's subsequent statement to the jury: "Out of an excess of caution, nobody heard me saying, I hope that you should or should not be interested in that question . . . I hope nobody heard me saying that the question shouldn't be considered interesting, I wasn't saying that, or that it was; I was just wondering if further elucidation of the question was going to help anyone." These instructions cured any impression of partiality which might have been produced by the court's previous ruling.

The defendants' remaining allegations of impropriety also do not show "actual bias or leave[ ] an abiding impression that the jury perceived an appearance of advocacy or partiality." *Laurins*, 857 F.2d at 537; *United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982). For example, the defendants object to actions the district court took simply to clarify the relevance of a line of questioning; to determine whether the defense counsel had successfully interrupted the part of a witness's testimony that the counsel found objectionable; and to clarify whether one of the officers was testifying that he "asked" or that he "told" the plaintiffs to follow his directions during the stop. These interventions are appropriately part of the judge's role as "more than a moderator or umpire. It is entirely proper for him to participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony." *United States*

v. Mostella, 802 F.2d 358, 361 (9th Cir. 1986) (citations omitted); *Laurins*, 857 F.2d at 537.

In terms of abiding impressions, the defendants also ignore instances in which the district court clearly assisted their side. For example, the district court walked witnesses through testimony in favor of crucial aspects of the defense's case. Specifically, the court helped the defense counsel establish the best possible explanation for the officers' confusion about whether the vehicle had a defective taillight or a defective turn signal. The court also made comments suggesting it believed the explanation.

Finally, the defendants base their assertion that the district court was actually biased on a statement made by the court during the post-trial evidentiary hearing. The statement, far from indicating bias, simply conveyed the court's evaluation of which side had the better case. The court, in fact, made this statement, in part, to inform the defense counsel of the hazards of seeking a new trial in which they might not only lose again but also potentially face renewed *Monell* claims. The court also commented on its appreciation of the strength of the plaintiffs' case in the course of evaluating the basis of the jury's verdict and whether prejudice potentially resulted from alleged jury misconduct. Other comments by the court, if anything, suggest bias against the plaintiffs. The court called the plaintiffs' lawyer "greedy" and said that if he was a good lawyer he would have – should have – accepted a settlement. The court also criticized individuals on the plaintiffs' side for supporting punitive damages in the case when they otherwise fail to do so in their public life. When the jury was in recess, the court also said, "if [this

case is] based on an outright lie on the plaintiff's side, somebody on the plaintiff's side belongs in jail." Then, in referring to the two officers, the court stated. "I say again, my presumption is that both of the two people I'm looking to at my left are guys that I would have liked to have known and been pleased to have them as friends, it may still be true." The record does not suggest actual bias nor does it suggest the district court did anything but conduct a fair and impartial trial.

VI. Juror Misconduct

The defendants contend that the jury verdict should be overturned because of the bias of two jurors and the jury's consideration of extraneous evidence. The defendants raised these arguments below and the district court held a post-trial evidentiary hearing to evaluate the claims. Defendants argue that the scope and nature of that hearing was inappropriate. However, "[t]he district court has the discretion to determine the extent and nature of the hearing." *Hard v. Burlington Northern Railroad*, 812 F.2d 482, 485 (9th Cir. 1986). The hearing in this case was reasonably calculated to resolve the doubts raised about the allegations of juror misconduct, and the process ensured that all parties were fairly represented. *Dyer v. Calderon*, 151 F.3d 970, 974 75 (9th Cir. 1998) (en banc). The district court held that the allegations did not merit reversal, and we agree.

A. Juror Bias

Defendants contend that two of the jurors, Glenn Eggert and John Wilhite, engaged in juror misconduct by purposefully withholding information during voir dire indicating bias. We evaluate such claims of juror misconduct according to a two-part test: (1) whether "a juror failed to answer honestly a material question on voir dire;" and (2) whether "a correct answer would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

With regard to juror Eggert, the district court made specific findings that his omission was an honest mistake and a relatively insignificant one at that. In voir dire, Eggert described a negative experience he had had with a police officer when he was a teenager. After the trial, the defense counsel learned that Eggert did not mention the fact that physical contact occurred, involving the officer backing Eggert up against a vehicle. The district court accepted Eggert's omission as an honest mistake. In the post-trial evidentiary hearing, Eggert explained that he omitted that fact because he did not think it was an important part of the story – he could not even recall whether he had told the other jurors about this aspect of the incident. Eggert also explained that he was trying to be brief in his response to the voir dire questions and would have given further descriptions of the incident if asked. The district court found Eggert credible and held that his failure to disclose this aspect of the incident was an honest mistake. We see no reason to conclude otherwise.

The district court also found that the omitted information did not indicate partiality. The defendants suggest that Eggert, at the post-trial evidentiary hearing, acknowledged he was biased against the police. However, Eggert's testimony was consistent with the statement he gave during voir dire: at the time of the incident, he thought he had been mistreated by the police officer, but due to the benefit of age and hindsight he had since recognized the officer was only doing his duty. If anything, Eggert's testimony reflects bias in favor of the defendants. It suggests Eggert was likely to think a youth might misperceive a police officer's actions as abusive, while maturity and more sober reflection would show the officer was only performing his duty.

With regard to juror Wilhite, the district court found that he omitted two pieces of information, but that, as in Eggert's case, neither omission indicated dishonesty or bias. During voir dire, Wilhite failed to mention, first, that his half-brother was a police officer and, second, that he had participated in a ride-along approximately fourteen years earlier in which he had witnessed improper police conduct. The district court, after examining Wilhite directly and allowing him to be questioned by opposing counsel, concluded that these omissions constituted an innocent oversight. We have no cause to reverse the district court's decision. Wilhite had been long estranged from his half-brother, and the court made a substantial inquiry before finally concluding that Wilhite honestly forgot to mention the relationship. Also, as the district court found, it was understandable that Wilhite had simply forgotten about the ride-along which occurred approximately fourteen years earlier, when he was fifteen

or sixteen years old. *See Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc) ("[W]e must be tolerant, as jurors may forget incidents long buried in their minds. . . . [A]n honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation.") (citing *McDonough Power*, 464 U.S. at 555-56). In any case, it appears that a correct answer would not have provided grounds for a challenge for cause. The district court did not commit clear error in finding that these omissions were honestly made. Accordingly, the court did not abuse its discretion in rejecting the charges of juror bias.[19]

B. Extraneous evidence

The defendants argue that they were denied a fair trial because the jury was exposed to extraneous evidence. They contend that Eggert and Wilhite's telling the other jurors about their own experiences with the police

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[19] The defendants also suggest that Wilhite and Eggert's bias should be presumed under the doctrine set forth in *Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir. 1998). However, "[o]nly in 'extreme' or 'extraordinary' cases should bias be presumed. *Tinsley v. Borg*, 895 F.2d 520, (9th Cir 1990) (citation omitted); *Dyer*, 151 F.3d at 974-75. It is a far stretch to claim this case presents such an exceptional circumstance. *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor J., concurring) (providing examples of situations where bias may be presumed such as "a revelation that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction."). Neither Wilhite nor Eggert "present a relationship in which the 'potential for substantial emotional involvement, adversely affecting impartiality' is inherent:" *Tinsley*, 895 F.2d at 527 (citation omitted).

constituted improper extraneous evidence. We disagree. We have recognized that "[j]urors must rely on their past personal experiences when hearing a trial and deliberating on a verdict." *Hard v. Burlington Northern Railroad*, 812 F.2d 482, 486 (9th Cir. 1986). The two jurors' past personal experiences were of a general nature, and involved only minor incidents that could not have prejudice [sic] the jury or influenced its decision. The district court acted within its discretion by ruling that the discussion of those experiences should not be considered improper extrinsic evidence.

Defendants also argue that juror Vivian Justis's commentary on the handwriting of one of the officers constituted extraneous information. On first seeing the traffic citation, Justis's remarked, "it looks like the writing of a deviate sociopath," a statement that defendants now characterize as "conduct[ing] a handwriting analysis of the Officer's citation." First, the juror's off-the-cuff statement does not even resemble the type of "extraneous information" this court proscribes. *See, e.g., United States v. Navarro-Garcia*, 926 F.2d 818 (9th Cir. 1991) (juror conducts out-of-court experiment to duplicate weight of drugs found in defendant's vehicle); *Marino v. Vasquez*, 812 F.2d 499 (9th Cir. 1987) (juror conducts out-of-court experiment with third party involving firing and positioning of handgun). Justis did not hold herself out as an expert, claim any special knowledge, or engage in empirical or experimental analysis. Even if we assumed Justis's remarks constituted "extraneous information," we would not conclude that a direct and rational connection exists between the information she presented and the jury's conclusion. *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir.

1993); *Navarro-Garcia*, 926 F.2d at 822-23. In reaching this determination, we accord special deference to the district court's analysis of the potential impact of such material on the jury. *United States v. Plunk*, 153 F.3d 1011, 1024 (9th Cir. 1998). Juror Wilhite responded to Justis by establishing that she had identified the wrong handwriting. He successfully discredited and embarrassed her in front of the other jurors. The district court was correct to conclude that juror Wilhite's response to Justis's statement "neutralized the effect" of her remark. Given the context and scope of the so-called hand-writing analysis, the district court did not abuse its discretion by refusing to grant a motion for a retrial on the basis of Justis's remarks.

VII. Abandoned claims against the city and the chief of police

Both parties agree that the plaintiffs abandoned their claims against the City of Torrance and its Chief of Police Joseph Deladurantey. There is also no dispute between the parties that judgment should correspondingly be entered for these two defendants. During trial, the district court dismissed the Chief of Police from the case after the plaintiffs decided not to introduce evidence against him. The plaintiffs expressly consented to the court's order dismissing him as a defendant. The plaintiffs also explicitly told the district court that they had abandoned their claims against the City of Torrance. The district court, however, did not enter judgment on behalf of either of these two defendants. Without explanation, the district court also denied these defendants' motion for modification of the final order to reflect judgment in

their favor. We reverse the district court's failure to enter judgment for the City of Torrance and the Chief of Police and direct that an appropriate order be entered upon remand.

CONCLUSION

The police officers in this case appear to have chosen the wrong young people. Two African American teens and a white teen were innocently driving through the City of Torrance, happily and quietly celebrating their graduation from prep school. For no good reason, two police officers stopped their car without probable cause or reasonable suspicion, conducted an illegal search of the vehicle, and used degrading and excessive force on the young boys. Such is not an isolated incident in the Greater Los Angeles area, or across the country. *See, e.g., Washington v. Lambert*, 98 F.3d 1181, 1187-88 (9th Cir. 1996) (discussing studies documenting traffic stops and police harassment of African American and Hispanic males). This time, however, the youngsters had the wherewithal and families with the legal knowledge and economic resources to seek justice for the wrongs committed. The defendants received a fair and impartial trial. In recognition of the officers' wrongdoing, the jury awarded the plaintiffs not only compensatory but also punitive damages. The defendants have given us no reason to doubt the correctness of the jury's determination.

The plaintiffs did, however, decide to abandon their claims against the City of Torrance and its Chief of Police. The district court's final order should have reflected judgment in favor of these two defendants. We remand

the case for the limited purpose of allowing the district court to enter judgment in favor of the City of Torrance and the Chief of Police in accordance with this opinion. In all other respects the verdict stands.

AFFIRMED in part, REVERSED and REMANDED in part.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARILYN PRICE, Guardian Ad Litem for LOHREN PRICE, CHERYL MASON, Guardian Ad Litem for DANIEL MASON, and NICOLE CRAMER, Guardian Ad Litem for NICHOLAS CRAMER, Plaintiffs-Appellees, v. ALBERT KRAMER, STEPHEN D'ANJOU, JOSEPH DELADURANTEY, and CITY OF TORRANCE, Defendants-Appellants.	No. 97-56580 No. 98-55484 D.C. No. CV-94-6506-JSL **ORDER** (Filed Feb. 22, 2000)

Before: D.W. NELSON, REINHARDT, and TROTT, Circuit Judges.

The panel has voted unanimously to deny appellants' petition for rehearing, for reasons explained in part in the MEMORANDUM set forth below.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Accordingly, the petition for rehearing and the petition for rehearing en banc are DENIED.

MEMORANDUM[1]

In their Petition for Rehearing (PFR), the appellants mischaracterize our opinion so that it appears we disagree with the general rule – as articulated in other federal circuits – that an interlocutory appeal on the issue of qualified immunity is mandatory not permissive. On the contrary, our decision is fully consistent with the PFR's claim that the appropriate rule to apply is: "an interlocutory appeal from an adverse pretrial ruling on qualified immunity is permissive, not mandatory, and the *issue* is not waived in a later appeal." *See* PFR at ii (emphasis added); *see also Littlewind v. Rayl*, 33 F.3d 985, 987 (8th Cir.1994) ("We acknowledge that defendants were not required to file an immediate interlocutory appeal from the . . . pretrial order denying their qualified immunity defense in order to preserve the qualified immunity *issue* on appeal.") (emphasis added); *Exchange Nat'l Bank of Chicago v. Daniels*, 763 F.2d 286, 290 (7th Cir.1985) ("It does not follow that the failure to appeal from whichever order is entered first forecloses the aggrieved party from raising all of the *issues* on appeal from the final judgment at the end of the case.") (emphasis added). In line with *all* these statements, we held that the *issue* of qualified immunity can be appealed from the final judgment even though the defendants did not take an interlocutory appeal. Indeed, Part II of the opinion is dedicated to the merits of the qualified immunity issue, as an appeal from the final judgment.

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[1] This memorandum, like the order itself, is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. R. 36-3.

In our opinion, we differed, however, with appellants' suggestion that the summary judgment *order,* as opposed to the qualified immunity *issue,* is reviewable after the final judgment – i.e., that the Court of Appeals should review the pretrial denial of qualified immunity on the basis of the evidentiary record at the time of summary judgment. We held that the qualified immunity *issue* is reviewed on the basis of the full record prior to *final* judgment and not on the limited record that existed at the time of summary judgment.

The general rule that following trial and final judgment we review the qualified immunity issue on the basis of the full record only, and not on the basis of the record at the time of summary judgment is set forth unequivocally and plainly in 15A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3911 (2d ed. 1992). The general rule – and the rule we applied – is as follows:

> Failure to appeal pretrial denial of a motion for summary judgment based on official immunity, for example, may be followed by a trial that produces information different from the information made available on the summary judgment motion. *Review after trial should be based on the sufficiency of the evidence at trial, not the sufficiency of the evidence on the summary judgment record.*

Id. at § 3911 n.80 (emphasis added). The general rule is, of course, entirely consistent with the rule that applies in the cases of all denials of summary judgment: "the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits." *Locricchio v. Legal Servs. Corp.,* 833 F.2d

1352, 1359 (9th Cir. 1987); *see also id.* (explaining that failure to adopt this rule would unjustly "deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial"); *Lum v. City and County of Honolulu*, 963 F.2d 1167, 1170 (9th Cir. 1992). The appellants' contention that we disregarded the general rule is without merit.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOHREN PRICE, *et al.*, Plaintiffs, v. A. KRAMER, *et al.*, Defendants.	CV 94-6506 KN ORDER Re: DEFENDANTS' MOTIONS IN LIMINE (Filed Febr. 9, 1996)

Based on the papers submitted, the Court ISSUES the following Order on Defendants' Motions in Limine.

I. Background

This action arises from a traffic stop and subsequent search of Plaintiff Lohren Price's ("Price") vehicle by Defendants Torrance Police Officers Stephen Danjou ("Danjou") and Albert Kramer ("Kramer"). On May 27, 1994, at approximately 12:20 a.m., Price, accompanied by Plaintiffs Nicholas Cramer ("Cramer") and Daniel Mason ("Mason"), were traveling southbound on Crenshaw Boulevard in the city of Torrance. Plaintiffs allege that Danjou and Kramer stopped the vehicle without probable cause and unlawfully detained each of the Plaintiffs. Thereafter, Danjou and Kramer allegedly subjected Plaintiffs to a frightening and humiliating search and searched Price's vehicle without probable cause or consent. Plaintiffs allege that the police officers' behavior violated 42 U.S.C. 1983 and was motivated by racial bias. Furthermore, Defendants Joseph DeLadurantey, Chief of the City of Torrance Police Department, and the City of Torrance are

liable under 42 U.S.C. 1985 and 1986 for maintaining a policy or custom of unreasonably seizing and searching individuals without probable cause. *See* Second Amended Complaint for Damages ("SAC").

Defendants bring the instant Motions to Exclude Evidence and Compel Production and Disclosure and Requesting Pre-Trial Determination Whether Qualified Immunity Applies to Defendants as to Plaintiffs' Claims of Constitutional Violations Regarding Unlawful Detention, Arrest and Search.

II. Motion to Exclude Evidence and Compel Production and Disclosure

Defendants move to exclude testimony of other lawsuits, claims, or complaints against the individual Defendants, the City of Torrance, and any of its employees on the grounds that such evidence is irrelevant, unfairly prejudicial, inadmissible character evidence, and inadmissible evidence of prior bad acts. In opposition, Plaintiffs argue that such evidence is admissible to show Defendants' state of mind and the regular practice of an organization such as the Torrance Police Department.

The Court agrees with Defendants that such evidence is inadmissible as to individual Defendants Danjou and Kramer, since these individual Defendants' subjective state of mind is irrelevant in an inquiry concerning Fourth Amendment violations. *See Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S. Ct. 2778 (1985) ("[W]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the

facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken.") (quoting *Scott v. U.S.*, 436 U.S. 128, 137, 98 S. Ct. 1717 (1978)). Additionally, evidence of other lawsuits claims or complaints against Danjou and Kramer cannot be used to show that these Defendants in this instance acted in conformity with any of the bad acts alleged in those prior complaints. *See* Fed. R. Evid. 404(b). Plaintiffs have not demonstrated that such evidence falls into any of the exceptions to Rule 404(b). The Court thus GRANTS Defendants' Motion as to Defendants Danjou and Kramer.

As to the City of Torrance and Police Chief DeLadurantey, evidence of other lawsuits, claims, or complaints against Danjou, Kramer, and any other employee may be relevant to Plaintiffs' claim for *Monell* liability. *See Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). For instance, evidence of other complaints filed and the manner in which the Police Department investigated and responded to such complaints may be relevant to show whether the Department failed to supervise its officers and had a policy oar custom of unreasonably seizing and searching individuals without probable cause. The Court thus DENIES the Defendants' Motion as to evidence of other claims against officers of the Department, on the basis that such evidence is relevant to Plaintiffs' *Monell* claim.

Defendants also move to exclude testimony by witnesses whose addresses and phone numbers have not been disclosed pursuant to Local Rule 9.4.5., or in the alternative, compel disclosure of the addresses and phone numbers of certain Plaintiffs' witnesses. The Court

DECLINES to exclude such testimony since the trial date is still several months away, and the Court does not believe that Defendants will be prejudiced by receiving the information at this time. Plaintiffs are ORDERED to provide such information to Defendants.[1]

Defendants' Motion is also brought under Local Rule 6.1.1 to compel production of a transcript of a juvenile traffic hearing which adjudicated the traffic citations issued to Price in this instant matter.[2] Plaintiffs refuse to provide a copy of the transcript on the grounds that the transcript was not contemplated to be used to prove Plaintiffs' allegations and will only be used for impeachment purposes.

The Court believes that Local Rule 6.1.1 contemplates documents that will be used by a party for its case in chief. As Plaintiffs have stated that they intend to use (if at all) the transcript from the hearing for impeachment purposes only, Plaintiffs are not required to provide a copy to Defendants. The Court thus DENIES Defendants' Motion to Compel a copy of the transcript.

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[1] Plaintiffs do not respond to Defendants' request for addresses and phone numbers of witnesses. Therefore, the Court may deem such non-opposition as consent. *See* Local Rule 7.9.

[2] Local Rule 6.1.1 orders parties "to exchange all documents then reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party."

III. Motion Requesting Pre-Trial Determination Whether Qualified Immunity Applies to Defendants as to Plaintiffs' claims of Constitutional Violations Regarding Unlawful Detention, Arrest and Search

Defendants move this Court for a pre-trial determination that the individual Defendants are entitled to qualified immunity from being sued by Plaintiffs for claims of constitutional violations of unlawful detention, arrest, and search.

> When a law enforcement officer asserts qualified immunity from liability for Fourth Amendment violations, the district court must determine whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful.

Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). The Ninth Circuit has held that "a determination of reasonable suspicion or probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge." *Act Up!*, *id.* at 873 (citations omitted). Additionally, "the determination of what conduct underlies the alleged violation – what the officer and claimant did or failed to do – is a determination of fact." *Id.* These are matters, where genuine issues of material fact exist, to be decided by the fact finder. *Id.* Whether those facts support an objective belief that probable cause or reasonable suspicion existed is then ordinarily a question for the court. *Id.* "If the court finds that a genuine issue of underlying fact does exist, it should postpone the qualified immunity determination until the facts have been developed at trial. *Id.* at 873-74.

A. Lawfulness of the stop

Defendants contend that officers Danjou and Kramer are entitled to qualified immunity for several reasons. First, the car stop was justified by Plaintiffs' admissions to violations of the State Vehicle Code. The Court is not persuaded that Defendants' reliance on *Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988), a Sixth Circuit case applying Ohio state law, establishes for the purposes of this Court that the officers are entitled to qualified immunity.[3] The fact that two of the Plaintiffs admitted that they were not wearing their seatbelts does not convince this Court that there are no disputed issues of material fact as to both the reasons that the officers initially identified Plaintiffs' vehicle for closer scrutiny and their conduct preceding and subsequent to the stop.

Defendants next argue that even absent Plaintiffs' admissions as to the vehicle code violations, Danjou and Kramer had an objectively reasonable basis for stopping and detaining Plaintiffs. According to Defendants, "the uncontroverted Vehicle Code violations and the Plaintiffs' suspicious conduct gave Officers Kramer and Danjou

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[3] The Court notes that the *Walker* Court explicitly relied on an Ohio state case for its ruling that the officers were entitled to qualified immunity. *See Walker*, 854 F.2d at 143, n.1. The Court also believes that the claims for which Plaintiffs in *Walker* were eventually arrested and charged – disorderly conduct and reckless driving – distinguish the two cases. Plaintiffs in this case were not arrested and were charged with vehicle code violations.

objectively reasonable grounds for stopping and questioning the Plaintiffs."[4]

Plaintiffs contend that the stop was pretextual, made by the officers with the intent to investigate their suspicions about other more serious criminal activity. Defendants "turned their vehicle around immediately after seeing the Plaintiffs, pursued them, watched them while they were in the gas station, and followed them again after they left, all without any justifiable basis for suspicion." Opp., p.8. The vehicle code violations which Plaintiffs were eventually cited for were but a pretext for the unlawful stop.

The Court believes that there is a disputed issue of fact on this issue precluding a pre-trial determination of qualified immunity. A determination of reasonable suspicion or probable cause requires an inquiry into the facts and circumstances within an officer's knowledge. *See, e.g., U.S. v. Maybusher*, 735 F.2d 366, 371 (9th Cir. 1984), *cert. denied*, 469 U.S. 1110, 105 S. Ct. 790 (1985) (reasonable suspicion); *U.S. v. Greene*, 783 F.2d 1364, 1367 (9th Cir. 1986), *cert. denied*, 476 U.S. 1185, 106 S. Ct. 2923 (1986) (probable cause). It appears to the Court that there are genuine issues of material fact as to whether the vehicle

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[4] Defendants point to the following behavior by Plaintiffs in support of their assertion that probable cause existed for the stop: the rear passenger, Cramer, "quickly turn[ed] around and [took] a furtive glance toward the police car." Mot., p.2. Price "suddenly" turned the vehicle into a gas station, and after pumping gas and leaving the gas station, traveled opposite their previous direction of travel. *Id.*

code violations were pretextual reasons for an otherwise unlawful stop.[5]

> A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. . . . Given the pervasiveness of minor regulations, who police actually stop may depend on arbitrary or discriminatory characteristics. Courts have long recognized that such arbitrariness is unreasonable within the meaning of the Fourth Amendment.

U.S. v. Cannon, 29 F.3d 472, 474 (9th Cir. 1994) (citations omitted). That the officers could have legitimately stopped Plaintiffs' vehicle is not necessarily determinative of the stop's reasonableness.

B. Reasonableness of the pat-down searches

Defendants contend that the pat-down searches of Plaintiffs were reasonable in light of their legitimate concerns for their safety and the particular facts of this case.[6] In conducting a Terry stop pat-down for weapons,

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[5] Plaintiffs contend that they were singled out by Defendants on the basis of race. (Plaintiffs Price and Mason are African-American.) The Court believes that Defendants' contention that Plaintiffs' allegations of racial animus are raised for the first time in their opposition to this Motion in Limine is incorrect. *See* Second Amended Complaint for Damages, ¶¶ 16, 21.

[6] Defendants point to the following circumstances: "the prospect of controlling three persons late at night, in an area with virtually no traffic, [the fact that the vehicle] was

> the officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate or unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

U.S. v. Salas, 879 F.2d 530, 535 (9th Cir. 1989), *cert. denied*, 493 U.S. 979, 110 s. Ct. 507 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)).

The Court believes that there are issues of disputed fact as to the reasonableness of the pat-down search that preclude a determination on the issue of qualified immunity. For instance, Plaintiffs contend that the officers approached the vehicle with guns drawn and pointed at Plaintiffs, and that in the course of the pat-down, Plaintiffs' testicles were forcefully grabbed and painfully pulled. *See* Opp. to Mot., p.6. As these are disputed issues of fact to be decided by the trier of fact, the Court does not believe that a determination of qualified immunity can be made at this time.

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registered to a woman at an out-of-the-area address, [and the fact that] [t]he occupants of the car had cast furtive glances upon spotting the officers, made an abrupt turn into a gas station, then turned about and begun to travel back in the direction from which they had come." Mot., pp. 6-7.

C. Reasonableness of the car search

Defendants maintain that the search of Plaintiffs' vehicle was reasonable, thus entitling the officers to qualified immunity. They allege that Officer Kramer conducted a lawful limited investigation to verify admitted vehicle code violations, that reasonable cause existed to search the passenger compartment for weapons[7], and that absent clearly established principles, Kramer objectively could have believed his search of the trunk was reasonable. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987) ("The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.").

The Court believes there are disputed issues of material fact on these issues. As the Court has discussed *supra*, the circumstances preceding the stop as well as the officers' subsequent conduct raise issues of fact that are reserved for the trier of fact. Whether the officers had reasonable suspicion or probable cause to conduct the search of the vehicle requires an inquiry into the facts of

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[7] Defendants cite "[t]he time of night, the lack of traffic, the numerical superiority of the suspects, their suspicious driving behavior, and the conflicting stories told to officers" as circumstances justifying the search for weapons.

the case that preclude a pre-trial determination of qualified immunity.

IT IS SO ORDERED.

DATED: February 9, 1996

/s/ David V. Kenyon
DAVID V. KENYON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARILYN PRICE, *et al.*, Plaintiff, v. A. KRAMER, *et al.*, Defendant.	CV 94-6506 JSL (Rcx) ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL; OR IN THE ALTERNATIVE, FOR EVIDENTIARY HEARING (Filed Sep. 16, 1997)

The motion for new trial or, in the alternative, for evidentiary hearing of defendants A. Kramer, *et al.* came for hearing regularly on July 21, 1997.

After holding an evidentiary hearing as requested by the defendants, having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the motion for new trial; or in the alternative, for evidentiary hearing of defendant A. Kramer, *et al.* be DENIED.

This order is a final order and will not be reconsidered except in accordance with the Federal Rules of Civil Procedure. For purposes of judicial economy, and to provide the parties with as timely a final decision as possible, the court has not fully articulated the grounds for its decision. Accordingly, this order may be supplemented only for that purpose within the next ninety days.

However, the decision and the substance of the order will not be altered.

IT IS SO ORDERED.

DATED: Sept. 16, 1997 /s/ Spencer Letts
J. Spencer Letts
United States
District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOHREN PRICE, a minor by his Guardian Ad Litem MARILYN PRICE, NICHOLAS CRAMER, a minor by his Guardian Ad Litem NICHOLE CRAMER and DANIEL MASON, a minor by his Guardian Ad Litem, CHERYL MASON,	**CASE NO. 94-6506 KN (Mcx)**
Plaintiffs,	**DEFENDANTS' NOTICE OF MOTION AND MOTION IN LIMINE REQUESTING PRE-TRIAL DETERMINATION WHETHER QUALIFIED IMMUNITY APPLIES TO DEFENDANTS AS TO PLAINTIFFS' CLAIMS OF CONSTITUTIONAL VIOLATIONS REGARDING UNLAWFUL DETENTION, ARREST AND SEARCH**
v.	
A. KRAMER, S. DANJOU, JOSEPH DE LADURANTEY, in their individual and official capacities and the CITY OF TORRANCE,	**PRE-TRIAL: February 5, 1996** **TIME: 10 A.M.** **CRTRM: 3**
Defendants.	

[NOTICE OF MOTION, TABLE OF CONTENTS, AND TABLE OF AUTHORITIES OMITTED.]

MEMORANDUM OF POINTS AND AUTHORITIES

Under *ACT UP!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993), this Court should, prior to trial, determine whether the Defendants have qualified immunity against Plaintiffs' claimed constitutional violations:

> "[w]hen a law enforcement officer asserts qualified immunity from liability for Fourth Amendment violations, the district court must determine whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful." *Id.* at 871.

ACT UP! also sets forth the steps the Court should take in making its determination as to whether qualified immunity is to be found. "First, a determination of reasonable suspicion or probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge." [citations omitted] *Id.* at 873. Then "[w]hether those facts support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court." *Id.*

I

UNCONTROVERTED FACTS.

On May 27, 1994, at approximately 12:20 A.M., Plaintiff Lohren Price was driving his mother's car slowly southbound on Crenshaw Boulevard within the City of Torrance. Mr. Price was accompanied by two passengers, Nicholas Cramer and Daniel Mason. Torrance Police Officers Stephen Danjou and Albert Kramer were patrolling their assigned area (North Torrance) in a marked police

car. The occupants of both vehicles immediately noticed each other, because it was late at night and there was no other traffic.

The officers observed the rear passenger, Nicholas Cramer, quickly turn around and take a furtive glance toward the police car. Suddenly, Price turned into a gas station at the southwest corner of Artesia and Crenshaw Boulevards.

Officers Danjou and Kramer, suspicious of the foregoing actions and feeling that the Plaintiffs were attempting to avoid police scrutiny, passed by Price's car and noted its license place numbers. The officers then stopped across the street and observed Price's car while it was in the gas station. While stopped, the officers radioed police communications and learned that Price's car was registered to a woman at a West Los Angeles address. The officers could see only three males in Price's car.

After several minutes, the Plaintiffs left the gas station and headed northbound on Crenshaw Boulevard – opposite their previous direction of travel. This further aroused the officers' suspicion. The officers again began to follow Price's car.

As they were following Price's car, the officers could see that Price, the driver, was not wearing his seatbelt. This was a clear violation of California's mandatory seatbelt law, Vehicle Code §27315(a). At the same time the officers observed that Price's rear passenger, Nicholas Cramer, was leaning too far forward to be properly wearing a seatbelt, which constituted another apparent violation of Vehicle Code § 27315(e). Both Lohren Price and

Nicholas Cramer have admitted that they were not wearing their seatbelts.

Officers Danjou and Kramer stopped Price's car. Price was asked for his driver's license and registration. Then, one-by-one, the Plaintiffs were asked to get out of the car. They were taken to the safety of the sidewalk and patted down for weapons.

As Officer Kramer patted down each Plaintiff, he asked brief investigatory questions. Price told Officer Kramer that the Plaintiffs were driving to visit a friend. Daniel Mason, who overheard the conversation between Price and Officer Kramer, confirmed Price's story, although he subsequently admitted at his deposition that it was not true. The other passenger, Nicholas Cramer, told Officer Kramer that the Plaintiffs were just driving around with no particular destination.

Officer Kramer then entered the passenger compartment of Price's car, where he tested the lights and turn signals. Officer Kramer also investigated the rear seat belts, in response to Nicholas Cramer's complaint that the rear seat belt was inoperative and that was why he had not been wearing it. Officer Kramer found that one end of Nicholas Cramer's lap belt was tucked down between the rear seat cushion and the seat back.

Following his inspection of the lighting switches and the rear seat belts, Officer Kramer went to the trunk, opened it and inspected the lighting connections for all of the rear lights.

Following the inspection, Officer Danjou issued a citation to plaintiff Lohren Price for violation of California Vehicle Code §§ 27315(a) [operator's failure to wear a seat belt] and 24252(a) [failure to maintain lighting equipment]. Officer Kramer issued a citation to Nicholas Cramer for violation of California Vehicle Code §27315(e) [passenger's failure to wear a seat belt].

II

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FROM SUIT FOR ANY CLAIM OF UNLAWFUL DETENTION OR FALSE ARREST.

A. The Car Stop Was Justified By Plaintiffs' Admissions To Violations Of The State Vehicle Code.

Defendants are entitled to qualified immunity for any alleged unlawful detention or false arrest, since the Plaintiffs admitted committing Vehicle Code violations justifying the stop and subsequent citations. In *Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988), plaintiffs pleaded "no contest" to the charges for which they were arrested. The plaintiffs subsequently sued the arresting officers for civil rights violations, false arrest, detention and imprisonment. The court held that "each plaintiff, in effect, admitted facts in open court evidencing his guilt" *Id.* at 141-42. "[T]he resulting conviction is a defense to a §1983 action asserting that the arrest was made without probable cause." *Id.* at 143. Hence, the *Walker* court found a "sound basis for the claim of qualified immunity" for the arresting officer. *Id.*

In this case, Plaintiffs were cited for admitted violations of the California Vehicle Code. Plaintiffs' admissions, which were confirmed under oath at their depositions, are perfectly analogous to the no-contest pleas in *Walker;* therefore, Officers Danjou and Kramer have qualified immunity from any claim of false arrest or detention.

B. Even Absent The Plaintiffs' Admissions, Officers Kramer And Danjou Had An Objectively Reasonable Basis For Stopping And Detaining The Plaintiffs.

It is well settled that "[t]he Fourth Amendment does not bar the police from stopping and questioning motorists when they witness or suspect a violation of traffic laws, even if the offense is a minor one." *United States v. Mitchell,* 951 F.2d 1291, 1295 (D.C. Cir. 1991); and *United States v. Montgomery,* 561 F.2d 875, 879-80 (D.C. Cir. 1977). Probable cause exists to stop a motorist when an officer observes a broken taillight, speeding, failing to stop for a stop sign, or even a minor registration tag violation. *Hallstrom v. City of Garden City,* 991 F.2d 1473 (9th Cir. 1992) [broken taillight]; *United States v. Prati,* 861 F.2d 82, 84-85 (5th Cir. 1988) [speeding]; *United States v. Pillow,* 842 F. 2d. 1001, 1004 (8th Cir. 1988) [running a stop sign]; and *United States v. Dunkley,* 911 F.2d 522, 524 (11th Cir. 1990) [illegible temporary tag on vehicle].

Here, Officers Danjou and Kramer were independently justified in the detention of the Plaintiffs based on all of their observations. In *United States v. Nikzad,* 739 F.2d 1431, 1433 (9th Cir. 1984), the court noted that the suspect "[e]xhibited nervous behavior that captured the

attention of police. Nikzad's glances and stares at the officers, nervous shuffling and evasion of police stares, provide grounds for a brief Terry-type investigative stop." In this case, the uncontroverted Vehicle Code violations and the Plaintiffs' suspicious conduct gave Officers Kramer and Danjou objectively reasonable grounds for stopping and questioning the Plaintiffs.

III

THE PAT-DOWN SEARCHES OF THE PLAINTIFFS WERE OBJECTIVELY REASONABLE.

In *United States v. Salas*, 879 F.2d 530, 536 (9th Cir. 1989), the Ninth Circuit concluded that in conducting a *Terry* stop pat-down for weapons,

> "the officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate or unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."

In making this determination, the Court should bear in mind the all-too-unfortunate fact that "[i]nvestigative detentions involving suspects in vehicles are especially fraught with danger." *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). It is therefore proper to order the driver out of a vehicle as a matter of course. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54

L.Ed.2d 331 (1977). Defendants submit that in today's Los Angeles, a reasonably prudent officer will always be safety-conscious, and therefore, experience dictates the use of extreme caution in even routine traffic stops.

In this instance, Officers Kramer and Danjou were faced with the prospect of controlling three persons late at night, in an area with virtually no traffic. The car in which the Plaintiffs were riding was registered to a woman at an out-of-the-area address. The occupants of the car had cast furtive glances upon spotting the officers, made an abrupt turn into a gas station, then turned about and begun to travel back in the direction from which they had come.

Thus, legitimate concerns for officer safety, when coupled with the particular facts of this case, justified the officers' objectively reasonable belief that the Plaintiffs posed a potential danger and that they should [sic] patted-down for weapons and questioned outside the car.

IV

THE CAR SEARCH WAS OBJECTIVELY REASONABLE.

A. Officer Kramer Conducted A Lawful Limited Investigation To Verify Admitted Vehicle Code Violations.

California Vehicle Code Section 2806 states:

> "Any regularly employed and salaried police officer or deputy sheriff having reasonable cause to believe that any vehicle or combination of vehicles is not equipped as required by this

> code or is in such unsafe condition as to endanger any person, may require the driver to stop and submit the vehicle or combination of vehicles to an inspection and such tests as may be appropriate to determine the safety to persons and compliance with the code." A copy of Section 2806 is attached as Exhibit A.

California Vehicle Code Section 24252(a) provides in relevant part:

> "All lighting equipment of a required type installed on a vehicle shall be maintained in good working order." A copy of Section 24252(a) is attached as Exhibit B.

California Vehicle Code Section 27315(d)(1) states in relevant part:

> "No person shall operate a private passenger motor vehicle unless that person and all passengers *16* years of age or over are properly restrained by a safety belt." (Emphasis in original.) A copy of Section 27315(d)(1) is attached as Exhibit C.

The evidence indicates that Officer Kramer entered the passenger compartment of Price's car to check the functioning of the turn indicators and Nicholas Cramer's statement that the rear seatbelt was inoperative. Similarly, Officer Kramer checked the wiring harness and lighting equipment in the trunk of the car. There is no competent evidence that Officer Kramer performed any other search or inspection of Price's car.

B. Reasonable Cause Existed To Search The Passenger Compartment For Weapons.

Only Officer Kramer searched Price's car. There is no evidence that Officer Kramer searched any portion of the passenger compartment other than places where a weapon might be hidden. Assuming for the sake of argument, however, that Officer Kramer searched the passenger compartment of Price's car for weapons, based upon the facts of this case, it was objectively reasonable for him to do so.

As the Supreme Court noted in *Michigan v. Long*,

> "[R]oadside encounters between police and suspects are especially hazardous, and [ ] danger may arise from the possible presence of weapons in the area surrounding a suspect. . . . [Thus,] the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. . . . [A *Terry* suspect might] break away from police control and retrieve a weapon from his automobile. . . . In addition, if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. . . . Or, [ ] the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons. In any event, we stress that a *Terry* investigation, such

> as the one that occurred here, involves a police investigation 'at close range,' . . . when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected." 463 U.S. 1032, 1049, 1051-52, 103 S.Ct. 3469, 3481-82, 77 L.Ed.2d 1201 (1983).

The time of night, the lack of traffic, the numerical superiority of the suspects, their suspicious driving behavior, and the conflicting stories told to the officers all justified a heightened concern for officer safety. Thus, this Court should find that Officer Kramer had an objectively reasonable justification to search the passenger compartment of Price's car for weapons.

C. Absent Clearly-Established Principles Governing The Search Of Price's Trunk, Officer Kramer Objectively Could Have Believed His Search Of The Trunk Was Reasonable.

All three Plaintiffs were minors at the time of the stop. With certain exceptions not applicable here, Torrance Municipal Code Section 45.2.1 makes it unlawful for a minor under the age of eighteen to aimlessly drive or ride about the public streets between 10:00 P.M. and sunrise of the next day. A copy of Section 45.2.1 is attached as Exhibit D. Section 45.2.1 was adopted by Ordinance No. 3237, a copy of which is attached as Exhibit E.

Because violation of the curfew ordinance is a misdemeanor committed in the presence of the officers, Officers Kramer and Danjou would have been justified in arresting each of the Plaintiffs, including Price, the driver of the car. It is an open question whether the Police may

conduct a broad search of the entirety of Price's car if probable cause to arrest existed, but the officers did not actually effect the arrest. *Michigan v. Long*, 463 U.S. at 1036 n.3, 103 S.Ct. at 3473 n.3. Absent clearly-established principles, under these circumstances Officer Kramer could have reasonably believed his conduct was lawful. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.")

V

CONCLUSION.

Defendants ask this Court to find that Defendants' acts are entitled to "qualified immunity," based upon the specific facts of this incident. Both officers acted with the belief that their actions were legally reasonable under the totality of the circumstances. Their actions were based on reasonable observations and reasonable inferences drawn from those observations. In *Hunter*, the court stated:

> "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' [citation omitted] This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued.

Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991) (per curiam).

A law enforcement officer is entitled to qualified immunity in a §1983 action if the Court determines that,

in light of clearly established principles governing the conduct in question at the time of the challenged conduct, the officer could reasonably have believed that the questioned conduct was lawful. Defendants respectfully request that this Court find that defendants have qualified immunity against suit for each and every one of the alleged constitutional violations.

DATED: January 12, 1996

Respectfully submitted,

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By: /s/ Robert D. Acciani
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOHREN PRICE, a minor by his *Guardian Ad Litem* MARILYN PRICE, NICHOLAS CRAMER, a minor by his *Guardian Ad Litem* NICHOLE CRAMER and DANIEL MASON, a minor by his *Guardian Ad Litem*, CHERYL MASON, Plaintiffs, vs. A. KRAMER, S. DANJOU, JOSEPH DE LADURANTEY, in their individual and official capacities and the CITY OF TORRANCE, Defendants.	CASE NO. 94-6506 KN (Mcx) PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE REQUESTING PRE-TRIAL DETERMINATION WHETHER QUALIFIED IMMUNITY APPLIES TO DEFENDANTS AS TO PLAINTIFFS' CLAIMS OF CONSTITUTIONAL VIOLATIONS REGARDING UNLAWFUL DETENTION, ARREST AND SEARCH PRETRIAL: February 5, 1996 TIME: 10:00 a.m. COURTROOM: 3

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

Plaintiffs LOHREN PRICE, NICHOLAS CRAMER and DANIEL MASON hereby oppose Defendants' Motion in Limine Requesting Pretrial Determination, Whether Qualified Immunity Applies to Defendants as to Plaintiffs' Claims of Constitutional Violations Regarding Unlawful Detention, Arrest and Search.

I.

FACTUAL BACKGROUND

On the evening of May 27, 1994, the Plaintiffs, Lohren Price, Daniel Mason, and Nicholas Cramer, went to a movie in Century City. Afterwards, they began driving towards home, just talking and reminiscing about the school year at Harvard Westlake, which they had just graduated. Exhibit B, p.19, 23; Exhibit C, p.12; Exhibit D, p.38, 44. Around midnight, Mason noticed that Cramer had fallen asleep in the back seat, and commented to Price, who was driving, that they should think about calling it a night. Exhibit D, p.45; Exhibit C, p.13. They decided to stop for some gas, and then turn around for home. Exhibit B, p.30; Exhibit D, p.45.

It was at this point that they first observed the Defendants, Torrance police officers Danjou and Kramer, who were patrolling in a marked police vehicle. The Plaintiffs were stopped at a traffic light, traveling southbound, and the Defendants were stopped at the same light, going north. When the light changed, the Defendants immediately made a U-turn, and began following the Plaintiffs. Exhibit B, pp.25-26; Exhibit D, p.48-49. The Plaintiffs had

already decided to get gas prior to seeing the Defendants. Exhibit B, p.30; Exhibit D, p.52. When they saw a gas station, they pulled in. The Defendants followed the Plaintiffs into the gas station, looked them over and then drove across the street and parked, still obviously watching the Plaintiffs. When the Plaintiffs drove out of the station and began driving home, the Defendants again began following them. MQI, p.2. Shortly thereafter, the Defendants initiated a traffic stop of the Plaintiffs' vehicle.

II.

APPLICABLE LAW

Where a genuine issue of fact exists, a determination of qualified immunity must be made by the trier of fact. *Act up!/Portland v. Bagley* 988 F.2d 868, 873 (9th Cir.1993). Where a Fourth Amendment violation is claimed, the factual issues that may preclude a pre-trial determination of qualified immunity fall into two categories. First, a determination of reasonable suspicion or probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge. *United States v. Maybusher*, 735 F.2d 366, 371 (9th Cir.1984) (reasonable suspicion), cert. denied, 469 U.S 1110, 105 S.Ct. 790, 83 L.Ed.2d 783 (1985); *United States v. Greene*, 783 F.2d 1364, 1367 (9th Cir.) (probable cause), cert. denied, 476 U.S. 1185, 106 S.Ct. 2923, 91 L.Ed.2d 551 (1986). Second, a determination of the conduct underlying the alleged violation – what the officer and claimant did or failed to do – is also a determination of fact.

The determination of whether the facts would support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court – when the operative facts are *not* in dispute. If the facts alleged by the defendant officer could not support a reasonable belief that his conduct was lawful, then he is not entitled to qualified immunity. *Act up!, supra.*

In making a pre-trial determination of qualified immunity, the threshold issue is whether the facts alleged by the defendant are uncontroverted. A pre-trial determination by the court is appropriate only if no genuine disputes of a material nature exist. *Act up!, supra.* If the court finds that a genuine issue of underlying fact does exist, it should postpone the qualified immunity determination until the facts have been developed at trial. *Act up!, supra* at 873-874.

III.

CONTESTED ISSUES OF FACT

The Defendants contend that they became "suspicious" of the Plaintiffs when they saw Nicholas Cramer "quicly turn around and take a furtive glance toward the police car." MQI, p.2. The Plaintiffs contest this averment. Cramer was in the back seat, so the only way the Defendants could have even seen him would have been after they had *already* made a U-turn and come up behind the Plaintiffs' vehicle. Obviously, the Defendants apparently were already "suspicious", although they have offered no reason why or what motivated them to turn around and follow the plaintiffs, who were conducting themselves entirely within the law. The plaintiffs contend it is

because Price and Mason are African-American, and that this wholly unlawful motive governed the conduct of the defendants.

Furthermore, the Plaintiffs deny the defense characterization of Cramer as "furtive". Cramer states that he was awakened when he heard Price and Mason talking about the police car that was following them, and he merely glanced back to see what they were taking about. Exhibit C, pp.13-14. This is hardly "furtive". In truth, it is a quite typical and common reaction of a passenger under these circumstances.

The Defendants further contend that when the Plaintiffs turned into the gas station, they felt that "the Plaintiff were attempting to avoid police scrutiny . . . " MQI, p.2. The *purpose* of that "scrutiny" is not revealed, and the contention is is [sic] adamantly denied by the Plaintiffs. Moreover, the Defendants shed no light on how they distinguished the Plaintiffs' vehicle from any other vehicle pulling into any other gas station. In truth, the Defendants' attempt to unreasonably characterize an innocent act as suspicious is an obvious attempt to cover-up their own unlawful conduct. The Plaintiffs contend that they were singled out by the Defendants on an invidious basis, that being one of race, and that the Defendants' "suspicion" was based upon their seeing two African-American males in the front seat of the case. From there, it was just a question of finding an excuse to pull them over.

The Defendants contend that they were able to observe that Lohren Price was not wearing his seatbelt, and this justified the stop. MQI, p.2 The Plaintiffs will show at trial that the Defendants could not in fact have

made this alleged observation. Owing to the configuration of the Plaintiffs' vehicle, the distance between the moving vehicles, the location of the seatbelts and the poor lighting conditions, such an observation would have been impossible. The Defendants further contend that Nicholas Cramer, who was sitting in the rear seat of the Plaintiffs' vehicle, "was leaning too far forward to be properly wearing a seatbelt. . . . " MQI, p.2. The Defendants must define "properly", as used in § 2715 of the Vehicle Code, and then describe how they could determine the application of that term to a rear seat passenger, at night, as viewed fro the vantage point of a following vehicle. The Plaintiffs contend that this alleged "observation", like the former one, is highly implausible and in fact is another falsehood to mask the Defendants' unlawful behavior.[1]

The Defendants' "uncontroverted facts" are further controverted by the statements of the Defendants themselves. Significantly, the Defendants' have claimed that the initial basis for the stop of the Plaintiffs' vehicle "was

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[1] The Defendants contend that the Plaintiffs' admissions that they were not wearing seatbelts dispose of their claims, pursuant to *Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988). This contention is misplaced. Unlike *Walker*, the issue here is not the facts underlying the Plaintiffs' admissions, but rather the Defendants' state of knowledge at the time they initiated the stop. The question is not whether the Plaintiffs were wearing their seatbelts, but whether the Defendants *knew* they were not wearing their seatbelts before making the stop. The Plaintiffs dispute that the Defendants were so aware. In any case, this argument does not address the Defendants' bad faith in making a "pretextual stop", or their improper conduct during the stop itself, as discussed *infra*. Walter is thus inapposite.

a clear violation of California's mandatory seatbelt law, Vehicle Code § 27315(a)." MQI, p.2:21-23. However, in his statement to the Torrance Police Department's Internal Affairs Officer, Defendant Danjou makes no reference to a seatbelt violation as being a cause for stopping the Plaintiffs. To the contrary, Danjou told Internal Affairs that the vehicle had been stopped for an "inoperative taillight". Exhibit A, p.1. In his deposition, however, he testifies that the Plaintiffs were stopped to investigate the possibility of criminal activity. Exhibit E, pp.56-57. Since these statements go directly to the issue of reasonable suspicion, the factual inconsistencies therein are highly relevant and must be resolved by the trier of fact.

There are further inconsistencies in the statements of the Defendants. In their statements to Internal Affairs, Defendant Danjou claimed to have been the "passenger officer". Defendant Kramer claimed that Danjou was driving, and that he (Kramer) was the "passenger officer". Exhibit A, pp.1, 5. This was not an isolated or accidental misstatement, as both officers also claimed that they each approached the right side of the vehicle, and that the *other* officer was the one who approached the driver of the vehicle, Plaintiff Price, and ordered him at gunpoint to exit the vehicle. *Ibid.*

The Defendants' "uncontroverted facts" also make reference to Defendant Kramer entering the Plaintiffs' vehicle, "where he tested the lights and turn signals". MQI, p.3. The Defendants attempt to use this reason to defend Kramer's search of the vehicle's *trunk*, saying that he was "inspecting the lighting connections" for the rear lights. This contention, however, is specifically contradicted by Danjou, who testified in his deposition that the

entire vehicle, including the trunk, was "thoroughy searched", and that the purpose of the search was to look for "contraband or stolen property". Exhibit E, pp.83-84. Defendants allege that Kramer searched the passenger compartment for weapons (MQI, p.8), but in his statement to Internal Affairs, Kramer stated that "the only time he entered the vehicle was to investigate [Plaintiff] CRAMER'S claim that the rear seat belt did not work." Exhibit A, p.8. Defendants further allege that "[a]bsent clearly-established principles, Officer Kramer could have reasonably believed his conduct was lawful." MQI, p. 10, However, Kramer told Internal Affairs that, in his opinion, probable cause did *not* exist to search the vehicle absent consent. Exhibit A, p.8. Plaintiffs deny that they were ever asked for, let alone gave, permission to search the car.

When contrasted with the statements of the Plaintiffs, there are further contested issues. The Plaintiffs contend that the Defendants approached the Plaintiffs' vehicle with their guns drawn and pointed into the car. While the Defendants make no mention of this issue in their statement of "uncontroveted facts", both Defendants have denied pointing their guns at the Plaintiffs. Exhibit A, pp.4, 7. Likewise, Defendant Kramer has denied the Plaintiffs' allegation that he forcefully grabbed and painfully pulled on their testicles as he was searching them. Exhibit A, pp.6-7.[2]

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[2] Defendants contend that "the particular facts of this case justified the officers' objectively reasonable belief that the Plaintiffs posed a potential danger and that they should [be] patted down for weapons and questioned outside the car." MQI,

IIII. [sic]

ARGUMENT

It is patently obvious that the vehicle stop at issue has nothing to do with seatbelts. This is clearly evinced by the treatment accorded the Plaintiffs after they were stopped. They were approached at gunpoint, separated, brutally searched, and forced to sit humiliatingly on the curb while being questioned about factors totally unrelated to the ostensible purpose of the stop. Even assuming *arguendo* that the stop itself was valid, the law holds that

> no additional intrusion into the passenger's liberty, such as a frisk or prolonged detention, may be justified by the traffic stop absent some additional suspicion.

Ruvalocaba v. City of Los Angeles, 64 F.3d 1323, 1327 (9th Cir.1995).

In the instant case, there was no "additional suspicion". To the contrary, the Plaintiffs were in a legitimate vehicle, properly owned and registered. They identified themselves, had no criminal records, and were polite and

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p.7. This contention is more than a little curious, in light of the Defendants' own citation of *United States v. Salas* 879 F.2d 530, 536 (9th Cir. 1989), where the court held that "in determining whether the officer acted reasonably. . . . due weight must be given, *not to his inchoate or unparticularized suspicion or 'hunch'*, but to the specific reasonable inferences which he is entitled to draw from the facts. . . . " The Plaintiffs submit that the "facts" of the case do not support the "inferences" which the Defendants are attempting to impute to them.

cooperative. Under the law, they should have been simply cited for any observable violations, and promptly sent on their way "without being subject to further delay by police for additional questioning" *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988). Instead, the Defendants had the Plaintiffs individually exit their vehicle to be searched and questioned, in contravention of the established principle that

> [q]uestions asked during an investigative stop must be "reasonably related in scope to the justification for their initiation."

United States v. Brignoni-Ponce, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975), quoting *Terry v. Ohio*, 392 U.S 1, 29, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968). *See also United States v. Millan*, 36 F.3d 886, 889 (9th Cir.1994) (the nature of questions asked during a vehicle stop is circumscribed by the purpose of the stop).

Questions relating to where the Plaintiffs were going, and where they were coming from, certainly cannot be construed as relating to seatbelt violations. As such, they were not only improper, but highly indicative of the Defendants' underlying motivation, which has nothing whatsoever to do with the Vehicle Code.

> "A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop." *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir.1988). [footnote omitted] In the absence of some limit on police

> power to make such stops, "thousands of everyday citizens who violate minor traffic regulations will be subject to unfettered police discretion as to whom to stop." Id. at 1516. Given the pervasiveness of minor regulations, who police actually stop may depend on arbitrary or discriminatory characteristics. Id. Courts have long recognized that such arbitrariness is unreasonable within the meaning of the Fourth Amendment. Id. at 1516-17 (citations omitted).

United States v. Cannon, 29 F.3d 472, 474 (9th Cir. 1994).

The Plaintiffs submit that this is what actually occurred here. For whatever their reasons, racial animus or otherwise, the Defendants decided that they were going to stop, search, and interrogate the Plaintiffs. The alleged Vehicle Code violations, if in fact the Defendants observed any prior to the stop (which the Plaintiffs deny), were but a pretext.

> That an officer theoretically could validly have stopped the car for a possible traffic infraction [i]s not determinative. Similarly immaterial [i]s the actual subjective intent of the deputy. [A] stop [i]s unreasonable not because the officer secretly hope[s] to find evidence of a greater offense, but because it [i]s clear that an officer would have been uninterested in pursuing the lesser offense absent that hope.

United States v. Smith, 799 F.2d 704, 710 (11th Cir. 1986).

Thus, when a traffic stop is alleged as having been pretextual, courts should inquire whether a reasonable officer "would have" made the stop anyway, apart from

any suspicions about other more serious criminal activity. *Cannon, supra* at 476.

Applying this construction of law to the instant case, the conclusion is ineluctable. Regardless of whether *arguendo* the Defendants *could* have legitimately stopped the Plaintiffs' vehicle, it is obvious that they actually made the stop to investigate their "suspicions about other more serious criminal activity." The Defendants assiduously sought an excuse to detain the Plaintiffs. They turned their vehicle around immediately after seeing the Plaintiffs, pursued them, watched them while they were in the gas station, and followed them again after they left, all without any justifiable basis for suspicion. When they could find no good reason to stop the Plaintiffs, they did it anyway, and now claim that it was for "seatbelt violation", which they discovered only *after* the stop. In his deposition, however, Danjou testified that the Defendants had stopped the Plaintiffs because they felt "there was a good chance that they possibly could be related to some type of crime", such as "auto thefts or auto burglaries". Exhibit E, p.57. Danjou also acknowledged that they had no more than "a generalized suspicion "that the Plaintiffs "might have been involved in some crime". *Id.* at p.56. Thus, the evidence is clear that this was a pretextual stop, and as such impermissible. The Defendants cannot now hide behind a shield of "immunity" to avoid the implications of their improprieties.

V.

CONCLUSION

While many of these controversies do not directly weigh upon the issue of probable cause, a Fourth Amendment claim does not end with the validity or invalidity of the initial detention.

> When a law enforcement officer asserts qualified immunity from liability for Fourth Amendment violations, the district court must determine whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful. [citation omitted] This standard requires a two-part analysis: 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?

Act up!, supra at 871.

Pursuant to this reasoning, the issue of whether the Defendants in fact approached the Plaintiffs' vehicle with their guns drawn and pointed, for what was ostensibly a "seatbelt violation," is certainly relevant. Furthermore, there can be no defense in the law to Plaintiffs' allegations that Defendant Kramer maliciously grabbed and pulled on their testicles while searching them. No "reasonable officer could have believed that [t]his conduct was lawful." *Id.* In light of the Defendants' established dissembling, if not outright fabrication, on issues such as the cause for the stop and the search of the vehicle, their credibility as to the other related issues is seriously impugned.

There thus exists substantial unresolved issues of material fact in the instant case. These issues can only be properly determined by a jury. Their resolution by the court, in a pre-trial procedure, would be inappropriate and contrary to Ninth Circuit law.

DATED: January 22, 1996

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOHREN PRICE, a minor by his Guardian Ad Litem MARILYN PRICE, NICHOLAS CRAMER, a minor by his Guardian Ad Litem NICHOLE CRAMER and DANIEL MASON, a minor by his Guardian Ad Litem, CHERYL MASON, Plaintiffs, v. **A. KRAMER, S. DANJOU, JOSEPH DE LADURANTEY, in their individual and official capacities and the CITY OF TORRENCE,** Defendants.	**CASE NO. 94-6506 KN (Mcx)** **DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION OF PRE-TRIAL DETERMINATION OF WHETHER QUALIFIED IMMUNITY APPLIES TO DEFENDANTS AS TO PLAINTIFFS' CLAIMS OF CONSTITUTIONAL VIOLATIONS REGARDING UNLAWFUL DETENTION, ARREST AND SEARCH** **PRE-TRIAL: February 5, 1996** **TIME: 10 A.M.** **CRTRM: 3**

[NOTICE, TABLE OF CONTENTS, AND TABLE OF AUTHORITIES OMITTED.]

MEMORANDUM OF POINTS AND AUTHORITIES

I.

SUMMARY OF ARGUMENT

Plaintiffs' Opposition relies upon an erroneous belief that there are disputed issues of fact that will prevent this Court from making a determination of qualified immunity. Plaintiffs either do not understand or will not accept that this Court should make an inquiry into the facts known by the Defendants.

In *ACT UP!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993) the court stated that "[a] determination of reasonable suspicion or probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge." [citations omitted] Id. at 873. Then "[w]hether those facts support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court." Id.

Plaintiffs' Opposition fails for one very important reason. The facts necessary for this Court to make a qualified immunity determination are essentially not in dispute and have been stated in Defendants' Motion. In *ACT UP!* the Court stated that the test is not whether disputed facts exist, but whether the facts are essentially not in dispute. Id. at 870.

In *Maryland v. Macon*, 472 U.S. 463, 470-71, 86 L.Ed. 2d 370, 105 S.Ct. 2778 (1985) the Supreme Court stated, "[W]hether a Fourth Amendment violation has occurred

'turns on the objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' (quoting *Scott v. United States*, 463 U.S. 128, 137, 56 L. Ed. 168, 98 S. Ct. 1717 (1978), and not on the officer's actual state of mined at the time the challenged action was taken." Id. 138-39.

Plaintiffs, sensing their sinking position on the qualified immunity determination, implore this Court to entertain the Plaintiffs' self-serving speculation as to what the officers could or could not see and the officers' motivation. Finally, and more disturbing, Plaintiffs now raise the existence of racial animus. This is outrageous and has no support. The pleadings are devoid of allegations of racial animus. There is not a scintilla of evidence that race had anything to do with the officers' actions. One can only wonder when this highly charged and volatile "national issue" became part of this action.

II

CONTESTED ISSUES RAISED IN PLAINTIFFS' OPPOSITION.

1. The Furtive Glance:

First, Plaintiffs contest that Defendants became suspicious of the Plaintiffs when they saw Nicholas Cramer "quickly turn around . . . " OPP. p.3. Instead, Plaintiffs argue that racial animus was the officers' motivation to effect a U-turn and follow the Plaintiffs. Plaintiffs argument makes no sense. How officers came to be behind the Plaintiffs is subjective and therefore irrelevant for purposes of a determination of qualified immunity.

Plaintiffs then make an alternative argument that Plaintiff Cramer's actions were not "furtive." OPP. p.4a. Nicholas Cramer testified at his deposition as follows:

Q. When were you first aware of a police unit?

A. It was before we stopped. I had – that had woke me up, some conversation about – or someone had said something that a police car was following – either Lohren had noticed in the back window, or in his rearview mirror, I'm sorry, or someone else had just commented on it, and I had sat up immediately, and at that point I couldn't tell you the street exactly.

Q. When you were cognizant of this statement or statements or notion that there was a police car behind you, did you look out any window to look at or for this police car?

A. I believe I glanced very quickly behind and I realized that that was something I shouldn't have done immediately, because I felt – I felt like it would be interpreted as suspicious. I – but I didn't think about it at the time. I just quickly glanced behind me.

(See Exhibit A. Cramer depo pp 13-14).

It appears that Plaintiffs' own sworn testimony corroborates Defendants' statements as to the suspicious "furtive" glance.

2. The Gas Station:

Next, Plaintiffs point to Defendants contentions that "the Plaintiffs were attempting to avoid police scrutiny . . . " by pulling into the gas station. Plaintiffs argue that Defendants shed no light on this. OPP. p.4. On the contrary, there is sufficient articulable [sic] facts which

support Defendants observations and suspicions. Officer Danjou testified at his deposition as follows:

Q. What was it about the turning into the gas station that was suspicious?

A. It didn't seem like when we had first observed them that they looked like they were going any place in particular. After looking back in the mirror at us, the driver decided to make a right-hand turn into the gas station when there was another gas station he had just passed up.

(See Exhibit B. Danjou depo p.30).

Plaintiff, Daniel Mason, testified at his deposition as follows:

Q. Now you're driving southbound on Crenshaw, you pass Artesia, what happens next?

A. Well, just prior to crossing Artesia we were probably, like a block away from the intersection, and I noticed a gas station on the southwest corner. I told him, might as well pull into the gas station and get our gas, you know but I told him to do it – do it slowly just incase they were – you know, they wanted to stop us or something, that there was no need for, you know turning in somewhere, like you know, abruptly or anything like that. I just told him to go about doing what you were doing, you know, very slowly.

(See Exhibit C., Mason depo p.51).

Officer Danjou's suspicions are articulated. Further, his suspicions are corroborated by Plaintiff Daniel Mason's own admission that he believed that they were under police scrutiny and that he appeared to be giving instructions to the driver, Lohren Price, on how not to abruptly pull into the gas station. Apparently, despite his best

efforts, their vehicle appeared to Defendants to pull into the gas station abruptly. Plaintiffs, however, continue to argue in their Opposition that this was invidious singling out of Plaintiffs' vehicle. It is Plaintiffs' position that is without any support in fact since Defendants' motivation is irrelevant.

3. Seatbelt violations:

Plaintiffs contend that Defendants could not observe that Plaintiffs, Lohren Price and Nicholas Cramer, were in violation of the California mandatory seatbelt law. Further, that Defendants used this to mask their unlawful behavior. Plaintiffs point to an Internal Affairs interview with Officer Danjou in which he did not mention seatbelts as being part of his reason to stop the vehicle. OPP. pp.4-5.

Plaintiffs fare no better with this argument. First, Plaintiffs rely on obviously inadmissible hearsay evidence. Plaintiffs Opposition Exhibit A is hearsay with no foundation or supporting declaration and should not even be considered proper evidence by this Court. Secondly, Officer Danjou testified at his deposition as follows:

Q. So you knew he [Price] was not seat belted; is that correct?

A. Yes.

Q. Was that one of the reasons that you initiated the stop?

A. Yes.

Q. Now, could you tell from that vantage point whether anybody else was seat belted or not?

A. It appeared that the subject in the back [Cramer] was not seated (sic) belted in.

Q. Why would you say that?

A. Because he was seated directly in the middle of the rear seat and he was leaned forward, leaning up against the driver's side – or the front seats, away from the back of the back seat.

Continuing:

Q. All right. Did you see whether the right front passenger [Mason] was seat belted before initiating the stop?

A. It appeared that he was.

(See Exhibit D, Danjou depo p. 62-3).

Plaintiff Lohren Price testified at his deposition as follows:

Q. Were you wearing your seatbelt when you were pulled over by the police?

A. No.

(See Exhibit E, Price depo, pp. 77).

Plaintiff, Nicholas Cramer testified at this deposition as follows:

Q. At the time you were stopped were you wearing your seatbelt?

A. No.

(See Exhibit F, Cramer depo, p. 39)

Clearly, testimonial evidence exists showing not only that Defendants observed Plaintiffs Price and Mason not wearing their seatbelts, but admissions to those violations. If the Court chooses to accept Plaintiffs Exhibit A

submitted in their Opposition, Defendants contend that the omission is merely de minimis and designed to mislead this Court.

For example, Plaintiffs fail to mention that Plaintiff, Daniel Mason, lodged a complaint a day after the traffic stop. Although Mason was assured that the Torrance Police Department would thoroughly investigate any claim, by interviewing all witnesses, the three Plaintiffs chose not to participate and disregarded the certified letters inviting them to call for an interview date and time.

Nearly two months later Officers Danjou and Kramer gave statements to Internal Affairs. Neither officer was represented and their statements were not given under oath. One may correctly draw the inference that Plaintiffs, once again, conceived a method by which to gain an unfair advantage. Plaintiffs knew that the officers would be ordered to make statements to Internal Affairs. These statements would be used as potential impeachment while the Plaintiffs could remain smugly silent. Nonetheless, Plaintiffs reliance on this omission is ill conceived because it is improper evidence before this Court.

4. Vehicle Search:

Curiously, Plaintiffs point to Officer Danjou for their support of an alleged illegal search. Unfortunately for Plaintiffs, Officer Danjou did not search the vehicle and, therefore, has no personal knowledge. Any statements are mere speculation by Officer Danjou which are irrelevant and inadmissible.

Plaintiff, Lohren Price, testified at his deposition as follows:

Q. After yourself and your passengers were seated on the curb, what did you see happen next?

A. The officers – one of the officers searched my car.

Q. Which officer was that?

A. Officer Kramer.

(See Exhibit G. Price depo p. 70).

Plaintiffs further allege that Officer Kramer did not search the vehicle for weapons and only went into the vehicle to investigate Plaintiff Cramer's seatbelt violation. OPP. p.6. Plaintiffs point, once again, to their Opposition Exhibit A. Plaintiffs appear desperate by buttressing their argument with clearly incompetent evidence. If Plaintiffs had looked to Lohren Price's sworn deposition testimony they would have realized that their contentions are futile.

5. Pat Down Search:

Plaintiffs have not addressed Defendants' contention that Defendants had the right to order Plaintiffs from the car and perform pat down searches. Apparently this is conceded. Instead, Plaintiffs present new issues at this late stage. It should be noted that Plaintiffs' Complaint is completely devoid of excessive force allegations just as it does not contain any allegation of racial animus. But now, with Pre-Trial Conference fast approaching, Plaintiffs are contending allegations that have never before been plead in this action. Plaintiffs unmistakably are attempting to create the appearance of contested facts. Plaintiffs should not be allowed to expand the scope of this action at this

late date to unduly prejudice the Defendants. Plaintiffs again manifest an intent to gain an unfair advantage over the Defendants.

III

ISSUES NOT ADDRESSED BY PLAINTIFFS' OPPOSITION MOTION.

1. Curfew Violation:

Apparently, Plaintiffs agree with Defendants contention that Plaintiffs were in violation of a valid City Ordinance and that Officers could have arrested them and conducted a search of the entire vehicle.

2. Conflicting Stories:

Defendant Kramer asked brief investigatory questions of each Plaintiff to either confirm or dispel his suspicions and received conflicting stories. DEF.MOT. p.3. Plaintiffs have not addressed this clearly relevant factor and apparently concede this.

More likely, Plaintiffs know that this factor alone is the death knell of their action. Plaintiffs lied to Defendants. This is inconsistent with innocent behavior and gave Defendants ample justification to complete their investigation.

Plaintiff Price testified at his deposition as follows:

Q. Now, you say that Officer Kramer was asking you some questions as to where you were going; is that correct?

A. Yes.

Q. Did you tell him?

A. Yes.

Q. What did you tell him?

A. I told him that we were going to a friend's house.

Q. Were you going to a friend's house?

A. No.

Q. So you lied to the officer?

A. Yeah.

(See Exhibit H, Price depo p. 48).

Plaintiff Mason testifed at his deposition as follows:

Q. What did he [Kramer] ask you?

A. First, he asked me, you know, what am I doing here. And I told him, you know, we were just – it was our last day of school and we decided to go, you know, out rolling, or whatever. And he's, like – I told him – from what I heard Lohren say, I was trying to make my story coherent – I told him we are out seeing a friend, one of his friends. And he was like, "do you know where he lives." I was like, "No, I don't know him."

(See Exhibit I Mason depo p. 80-81)

Continuing:

Q. But you in fact did tell the police officer in that situation that you say was so critical for you, you told the police officer something that you did not know for certain was true; is that correct?

A. Among other statements which were true, yes.

(See Exhibit I, Mason depo p. 83)

Finally, Plaintiff Nicholas Cramer testified at his deposition as follows:

Q. What did Officer Kramer ask you?

A. He was interested that I lived a very great distance from where I was, asked why that was, asked where we were going that evening.

Q. What did you tell him when he asked you where you were going that evening?

A. I told him that we were jut [sic] driving around and we had no particular destination.

(See Exhibit J, Cramer depo p. 35).

Plaintiffs made statements that were conflicting, deceitful and designed to cloud the truth regarding Plaintiffs' actions. These lies are not consistent with innocent behavior and when coupled with Defendants' other observations would lead any reasonable officer to conclude that Defendants' investigation was warranted and lawful.

3. California Vehicle Code Section 2806:

Plaintiffs have not addressed and concede Defendants' contention that Defendant Kramer's search of Plaintiffs vehicle pursuant to California Vehicle Code section 2806 was objectively reasonable for a lawful purpose. Instead, Plaintiffs rely on Officer Danjou's speculation regarding the search and a hearsay document (Opp. Exhibit A).

Plaintiff, Lohren Price, testified in his deposition that Officer Kramer conducted the search of his vehicle.

(See Exhibit G, Price depo p. 70-71). He clearly supports the Defendants' contentions that Officer Kramer not only looked in the area of the front and back seats, but also was involved in checking vehicle equipment. It is no

wonder Plaintiffs fail to expose Plaintiff's testimony to this Court which supports Kramer's search in the area of front and rear seats where weapons could be found and not surprisingly, the vehicle equipment check pursuant to the California Vehicle Code.

IV

PLAINTIFFS' SUPPLEMENTAL OPPOSITION SUPPORTS DEFENDANTS' CONTENTIONS THAT "STATE OF MIND" IS NOT RELEVANT.

Plaintiffs rely on *United States v. Hernandez*, 55 F.3d 443 (9th Cir. 1995) in their opposition. Plaintiffs, however, have misread Hernandez. *Hernandez* did not incorporate or adopt any test regarding "general practices" of the respective police department. *Hernandez* refereed [sic] to *United States v. Guzman*, 864 F.2d 1512 (10th Cir, 1988) only for the proposition that the focus of whether a stop is pretextual is whether a reasonable officer would have pursued the minor traffic violation.

Plaintiffs again are seeking to create obstacles. Now the Plaintiffs want this Court to forego a determination because they argue that a jury would have to determine the "general practices' of a particular police department. One only supposes that this would be accomplished with another parade a [sic] witnesses. This Court needs only inquire into the objective facts in determining this issue.

V

PLAINTIFFS' OPPOSITION TO DEFENDANTS MOTION RAISES NEW ISSUES

For the first time in their Opposition to Defendants' Motion for Qualified Immunity, Plaintiffs raise two new allegations: (1) that Defendants' conduct was motivated by racial animus; and (2) that Defendants committed an excessive force violation by cruelly squeezing the Plaintiffs' testicles during the pat-down searches. Neither of these allegations is pled in the complaint. Plaintiffs' depositions were taken on January 5, 1995. Should the Plaintiffs have wished to amend their complaint, they should have done so before the Scheduling Order was entered on January 23, 1995.

Plaintiffs must now seek the Court's permission to amend their complaint, and before leave is granted, Plaintiffs must affirmatively demonstrate good cause to be allowed to amend their complaint at this late hour. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604-609-10 (9th Cir. 1992). Defendants submit that Plaintiffs cannot satisfy their burden on this issue. The Court should not permit Plaintiffs to incorporate a "backdoor" amendment of their complaint at the Pretrial conference, and in the event the Court does not completely dispose of this action, the Pretrial Conference Order should preclude the racial animus and excessive force issues from being tried.

VI

CONCLUSION.

Defendants' Motion Re Qualified Immunity demonstrates that there are no material facts in dispute and that Defendants are entitled to a finding of "qualified immunity" as a matter of law. In responding to Defendants' motion, the Plaintiffs have had a full opportunity to develop the facts and legal arguments in support of their position. They have failed to do so. The Court need not await a formal summary judgment motion, or proceed to trial, under these circumstances. *Portsmouth Square, Inc. v. Shareholders Protective Committee*, 770 F.2d 866, 869 (9th Cir. 1985)

DATED: January 29, 1996

Respectfully submitted,
JOHN L. FELLOWS III
City Attorney

By: /s/ Robert D. Acciani
Robert D. Acciani
Senior Deputy Attorney
Attorneys for Defendants

PORTION OF REPORTER'S TRANSCRIPT ON VOIR DIRE (JUNE 3, 1997), PP. 46-47:

* * *

[46] [THE COURT:] Question No. 6 is, you or any member of that group, from here forward will go pretty quickly.

Number 7 is, have you or any member of that group ever testified either in a civil or criminal proceeding. In court, if you've done it, you know it, you get on the witness stand, raise your hand and you testify.

The most common out-of-court deposition testimony – and almost everybody knows what it is – is the deposition. If you ever had your deposition taken, you probably know it. It's done in a lawyer's office. Usually there's a court reporter there; again, you're placed under oath and asked questions.

In the broadest sense – and let's do it in the broadest sense – if you've ever been asked questions under oath with a court reporter, somebody recording your answers, treat that as testimony. If it was involved in any way with a judicial proceeding, the answer to the question will be yes, and we will treat it that way.

Number 8 is, are you or any member of that group employed by, or have you ever been employed by, or applied for a position with any law enforcement agency. And read law enforcement agency broadly. Indeed, let me make it more broad than that.

Any job involved with law enforcement, security [47] guards, for example, could be involved with law enforcement, notwithstanding it's not a law enforcement agency.

The district attorney's office, that's law enforcement; judges are law enforcement.

For this purpose, any job that has to do with making the legal system work, answer the question yes. It may or may not be relevant to anything, but let's read it broadly and answer the question yes. That's No. 8.

Number 9, have you or any member of that group ever received any training or education in law enforcement. Again, read that very broadly. It's not just courses in school.

Law enforcement agencies have things like ride-along programs. There's a whole bunch of things that you could have been exposed to. If you have been, answer the question yes.

Number 10, have you or any member of that group ever been a victim of a crime.

Number 11, have you or any member of that group ever had a singularly pleasant or unpleasant experience with a law enforcement officer or agency.

Number 12 is one who can produce sensitive answers, and if it does, just remember what I said. Have you or any member of your family or any member of that group ever been arrested or prosecuted in a criminal proceeding?

* * *

FURTHER PORTION OF REPORTER'S TRANSCRIPT ON VOIR DIRE (JUNE 3, 1997), PP. 55-56:

* * *

[55] THE COURT: Thank you.

Mr. Eggert?

PROSPECTIVE JUROR EGGERT: In terms of questions, No. 6, my brother is a former real estate attorney; doesn't really practice anymore. He, like, develops real estate up in the Sacramento area.

THE COURT: Okay.

PROSPECTIVE JUROR EGGERT: So I guess it's kind of related.

But victim of a crime just my vehicle, my car's gotten broken into a couple times. Police response was fine.

Number 12, experience, I was in high school, like 17 years old, I was involved with trying to break up a fight at, like, a Jack-in-the-Box after, like, a football – you know, high school football game, and I – like, an alcoholic beverage fell out of my jacket and smashed on the asphalt. And right when that happened, a police officer pulled up, and then cited me for an open container.

[56] THE COURT: And let everybody else go?

PROSPECTIVE JUROR EGGERT: I'm sorry?

THE COURT: And let everybody else go?

PROSPECTIVE JUROR EGGERT: Let everybody else go.

I thought I was, I mean, unfairly – I mean, at the time I was kind of upset. I was young. But I just felt, you know, I was kind of being a good samaritan breaking the fight up, and I got busted basically. But in hindsight, I knew that he was doing his job to secure the situation.

Other than that, that's the only questions.

THE COURT: Go ahead.

PROSPECTIVE JUROR EGGERT: I reside in Belmont Shores near Long Beach. I work for LA Cellular in corporate accounts, major account sales. And I'm an account executive; and I'm single, no prior jury experience.

THE COURT: Thank you.

* * *

FINAL PORTION OF REPORTER'S TRANSCRIPT ON VOIR DIRE (JUNE 3, 1997), PP. 58-60:

* * *

[58] THE COURT: Thank you.

Mr. Wilhite.

PROSPECTIVE JUROR WILHITE: I answered yes to No. 7. I was – I gave depos for a car accident in '95, and I'm scheduled to give depos in July. And I was a – not a direct victim; my father-in-law was murdered up north. And that's about it.

THE COURT: Let me go back to the first one.

Were you a party to those lawsuits?

PROSPECTIVE JUROR WILHITE: I'm sorry?

THE COURT: Were you a party to the lawsuit that you gave depositions in?

PROSPECTIVE JUROR WILHITE: Yes.

THE COURT: Were you in the car?

PROSPECTIVE JUROR WILHITE: Yes, I was the driver.

THE COURT: How was the law enforcement [59] response to that?

PROSPECTIVE JUROR WILHITE: I was unconscious. I don't know.

THE COURT: And the lawsuit came out of that; were you the injured one?

PROSPECTIVE JUROR WILHITE: Yes.

THE COURT: I guess I'll ask, are you okay now?

PROSPECTIVE JUROR WILHITE: Sure.

THE COURT: Outstanding; I'm glad.

Was the process all right?

PROSPECTIVE JUROR WILHITE: I'm sorry?

THE COURT: Was the process, the legal process, as far as you could tell, all right?

PROSPECTIVE JUROR WILHITE: Yes.

THE COURT: Okay.

The other one, can you tell me a little – I don't know that I need to unless the lawyers need much more follow-up – it was your father-in-law; did you know him well?

PROSPECTIVE JUROR WILHITE: No.

THE COURT: Do you know anything at all about the law enforcement response to that, or how it happened?

PROSPECTIVE JUROR WILHITE: I know how it happened. He was a prison guard, and he got – he covered for somebody on vacation, and they accidentally killed the [60] wrong person, the wrong guard.

THE COURT: He was a prison guard and they had in mind killing a prison guard?

PROSPECTIVE JUROR WILHITE: Right.

THE COURT: And they got the wrong guy?

PROSPECTIVE JUROR WILHITE: Right.

THE COURT: I understand that.

Was anybody prosecuted in connection with that later?

PROSPECTIVE JUROR WILHITE: They were prosecuted twice, and on the third time they threw it out because it was – evidence was stale.

THE COURT: May I ask you to address the board.

PROSPECTIVE JUROR WILHITE: I live in the City of Downey. I'm an FSR for Southern California Edison. My wife is a U.S. Customs broker for Southern Wine and Spirits. And I have one criminal trial with a verdict.

THE COURT: I'm probably the only ignorant person in the room, but I don't know what an FSR is; what is it?

PROSPECTIVE JUROR WILHITE: I'm the one that turns your power on and off when you don't – well, when you do or don't pay your bill.

THE COURT: I'm so glad you made that change.

I think that should do it.

* * *

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARILYN PRICE, et. al., Plaintiff, vs. A. KRAMER, et. al., Defendants.	**Case No. CV 94-6506 JSL** **NOTICE OF MOTION AND MOTION FOR NEW TRIAL; OR IN THE ALTERNATIVE, FOR EVIDENTIARY HEARING; MEMORANDUM POINTS AND AUTHORITIES; DECLARATION OF ROBERT ACCIANI AND JOHN WILHITE IN SUPPORT THEREOF** Date: July 21, 1997 Time: 1:00 p.m. Place: 4

TO ALL INTERESTED PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 21, 1997, at 1:00 p.m., or as soon thereafter as the matter may be heard in Courtroom "4" of the United States District Court, Central District, before the Honorable Judge J. Spencer Letts, Defendants ALBERT KRAMER and STEPHEN D'ANJOU will move this Court for an order for a new trial, or in the alternative, for an evidentiary hearing in the above captioned matter.

Said motion is based upon this notice, the attached memorandum of points and authorities, declarations, Exhibits, any papers, documents, transcripts, or other material on file herein and on any such oral argument as may be permitted by this Court at the time of hearing.

DATED: June 23, 1997

/s/ Robert D. Acciani
ROBERT D. ACCIANI
Attorneys of record
for Defendants,
ALBERT KRAMER and
STEPHEN DANJOU

MEMORANDUM OF POINTS AND AUTHORITIES

I. OPENING SUMMARY OF ARGUMENT

Movants contend that a new trial is warranted based upon jury misconduct on the grounds that:

1. A juror began polling the jury even before plaintiff completed its case.

2. Jurors interjected extrinsic evidence, their unscientific handwriting analysis of the traffic tickets.

3. Juror bias.

4. Juror withholds prejudicial information in voir dire which is then discussed with juror causing a biased and impartial verdict.

II. A NEW TRIAL IS APPROPRIATE WHERE OVERTURES HAVE BEEN MADE TO PREDETERMINE THE OUTCOME OF THE TRIAL.

This Court admonished this jury not once, but twice with respect to the dangers of predetermination and discussions prior to deliberations.

On the first occasion, this Court read and explained the Preliminary Jury Instructions to the panel, including instruction number 9 which specifically addresses the same danger. A true and correct copy of said instruction is attached hereto for the convenience of the Court as Exhibit "A."

On the second day of trial, this Court stated to the jury:

> . . . Be careful here, remember that the plaintiff's [sic] case goes first, you've heard from two of the plaintiffs, actually, you haven't heard it all, anything else, so the one thing I want to remind you of, *it's very dangerous to let yourself – much less talk with other people about it – it's dangerous to let yourself start forming conclusions early because if you start forming conclusions early you start running things through that tentative conclusion to see if it was right.* That's okay in ordinary life, it works very well in ordinary life; it's dangerous in lawsuits, so try not to do that." (Emphasis added) (See Reporter's transcript of June 4, 1997 at page 96; line 22 through page 97; line 11.)

Both admonitions and the Court's subsequent inquiries of "did you make it through the night?" specifically addressed these dangers. Unfortunately, the jurors never gave any indication of any problem.

III. CONSIDERATION OF EXTRINSIC EVIDENCE DURING DELIBERATIONS CREATES A PRESUMPTION OF PREJUDICE.

A. HANDWRITING ANALYSIS EXPERIMENT

In the Ninth Circuit, it has long been held that:

> "In conducting their deliberations, '[j]urors have a duty to consider only the evidence which is presented to them in open court,' *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986) (citing *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S.Ct. 546, 549-50, 13 L.Ed.2d 424 (1965); *United States v. Bagnariol*, 665 F.2d 877, 884 (9th Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982)). Evidence not presented

> at trial, acquired through out-of-court experiments or otherwise, is deemed "extrinsic." *See Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987). . . . "

See, U.S. v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir. 1991).

In this case, Ms. Vivian Justis and Ms. Jessica Schulman conducted handwriting analysis of the traffic citations admitted into evidence. See declaration of John Wilhite and Declaration of Robert D. Acciani.

When extrinsic evidence is presented to a jury, a new trial is mandated even of there is just the "possibility" that the evidence "may" have affected the reasoning of "even one juror." *See, U.S. v. Navarro, supra*, at page 821.

The proper inquiry in an instance where extrinsic evidence was presented to the jury is whether the non-complaining party, or the prevailing party, can show "beyond a reasonable doubt that the extrinsic evidence did not affect the verdict." *See, U.S. v. Navarro, supra*, at page 821; *See also, Chapman v. California*, 386 U.S. 18, at page 24, 87 S.Ct. 824, at page 828, 17 L.Ed.2d 705 (1967); and *Marino v. Vasquez*, 812 F.2d 499 at page 504 (9th Cir. 1987).

This is what is commonly referred to as the "presumption of prejudice" as it is the obligation of the non-complainant to rebut the presumption. The rule is similar to the rule governing private communication, contact, or tampering with a juror during the course of the trial. *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954).

B. JUROR BIAS

Mr. Eggert disclosed to Mr. Wilhite prior to deliberations that he wholeheartedly believed plaintiff Daniel Mason and would not believe the police even though neither of the defendants had yet testified. See Declaration of John Whilhite.

In *In Re Herbert,* 806 F.2d 889 (9th Cir. 1986), the Court stated at page 888:

> "The existence of jury bias may violate the defendant's Sixth Amendment right to a fair and impartial trial. . . . "

In *In Re Herbert, supra,* the Court concluded that any effect the biased comment made by the juror in open court was ameliorated if not resolved by a prompt instruction by the Judge as well as by the juror's removal from the jury panel.

In this case, the comments which exhibit bias, as well as the experiment were not made in open court and were made, at least in part, during deliberations. Since the Court and the parties were unaware of the bias, neither instruction by the Court nor her removal was possible.

C. WITHHOLDING JUROR INFORMATION.

Extrinsic evidence can also take the form of information which a juror has, which he or she has withheld from the Court and parties and which was discussed with the jury.

In this case, Mr. John Wilhite did not advise the Court that his brother was a police officer. More importantly, he did not disclose that he had been on a police ride-a-long during which he witnessed police misconduct during a traffic stop. Mr. Wilhite shared with the jury that he observed the police "ripping" a car radio out of a car and pouring beer into the passenger compartment of the car. See Declaration of John Wilhite.

In the second instance, Mr. Eggert informed the Court regarding a citation for an open container he believed he received unfairly as he was simply being a "Good Samaritan." However, he did not share with this Court that during the incident a police officer shoved him into a van and handled him roughly. According to Mr. Eggert, he was "punked around by the police" and because of this incident, he could "relate" to what happened to the plaintiffs. See Declaration of John Wilhite and of Robert D. Acciani.

In *Hard v. Burlington Northern R.R.*, 812 F.2d 482 (9th Cir. 1987), a member of the jury, Fraser, as well as his father, were later discovered to have worked for the rail road company. Despite some questioning by the Court during voir dire, Fraser did not disclose this information.

In its opinion, the Ninth Circuit stated that, unlike in the present case, although the questions were ambiguous, there nevertheless, existed the "possibility" that the juror was "dishonest," and therefore, at least an evidentiary hearing was mandated. *Hard, supra,* at page 484.

IV. IN THE ALTERNATIVE, AN EVIDENTIARY HEARING IS REQUESTED.

In the alternative, it is requested that this Court, at the very least, grant a request that an evidentiary hearing be held regarding these issues.

In *Hard, supra,* the Ninth circuit held at page 485:

> "Considering these factors and the policy in favor of such hearings in light of the juror affidavits, the district court abused its discretion by not holding a hearing to investigate the allegation that Fraser failed to answer honestly a material question during voir dire. See *McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984).*"

Likewise, in this case, it is requested that such an evidentiary hearing be held to investigate the aforementioned allegations.

The lack of juror affidavits does not impact upon the requirement of conducting the necessary evidentiary hearing.

In *U.S. v. Navarro, supra,* 926 F.2d 818 (9th Cir. 1991), the Court stated at page 822:

> "In denying Navarro-Garcia's motion for an evidentiary hearing, the district court misapprehended the applicable law. The court stated that an evidentiary hearing should not be granted 'unless the defendant can show reliable and clear evidence or jury misconduct or, in the absence of such evidence, show that the possibility of prejudice is so great that prudence

> requires further inquiry. . . . ' This ruling was erroneous."

In *Navarro, supra.* The Honorable Justice Reinhardt went on to hold that an evidentiary hearing was mandated when the defendant's attorney submitted an affidavit alleging juror misconduct by cccconducting [sic] outside experimentation. In reversing and remanding, the Ninth Circuit held that the attorney's affidavit did not lack credibility. *Id.*, at page 822.

V. CONCLUSION

For the foregoing reasons, and in the interest of justice and fairness, Defendants request that a new trial be granted on the aforementioned grounds. In the alternative, it is requested that this Court grant Defendants' request for an evidentiary hearing in order to investigate the allegations of juror misconduct.

DATED: June 23, 1997

/s/ Robert D. Acciani
ROBERT D. ACCIANI,
Attorneys for Defendants,
ALBERT KRAMER and
STEPHEN D'ANJOU

COURT'S PRELIMINARY INSTRUCTION NO. 9

I will now say a few words about your conduct as jurors.

First, do not talk to each other about this case or about anyone who has anything to do with it until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case or about anyone who has anything to do with it until the trial has ended and you have been discharged as jurors. "Anyone else" includes members of you [sic] family and your friends. You may tell them that you are a juror, but don't tell them anything about the case until after you have been discharged by me.

Third, do not let anyone talk to you about the case or about anyone who has anything to do with it. If someone should try to talk to you, please report it to me immediately.

Fourth, do not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it.

DECLARATION OF ROBERT D. ACCIANI

I, Robert D. Acciani, declare as follows:

1. I am an attorney at law duly licensed to practice law before all the State Courts of California and the United States District Court for the Central District of California. I am the attorney of record for defendants, Albert Kramer and Stephen Danjou, in a federal action entitled *Price et al. v. Kramer et al., CV 94-6504 JSL.* As such, I have personal and first-hand knowledge of the facts set forth below and, if called upon to do so, could and would testify competently thereto under oath.

2. Although I had arranged in advance for a certified daily transcript of the proceedings, I have yet to receive the first day's proceedings which included the voir dire of the jury, nor the side bar discussions that occurred throughout the entire trial. The court reporter, Mr. Terry Kramer, will provide these during the week of June 23, 1997. Therefore, at the time of this declaration, there are some assertions that are based solely on my own recollection of the events.

3. Immediately after the jury was dismissed, I spoke with several jurors, including Juror No. 5, Mr. Wilhite, and the foreperson, Juror no. 3, Mr. Eggert.

4. Mr. Wilhite stated to me that his brother was a police officer, and that he had been on a ride-a-long with police officers in the past. He stated to me that on one of these ride-a-longs he personally observed what he believed to be improper police conduct. He stated that he had seen officers call the detainees "assholes," observed

officers rip out a stereo radio from a car and pour beer into the vehicle.

5. I do not recall Mr. Wilhite ever disclosing the fact that his brother was a police officer, nor the fact that he had personally observed police misconduct when asked about knowing anyone in law enforcement or any unpleasant experiences with law enforcement. The failure to disclose those facts effectively precluded defendants the opportunity to select a fair and impartial jury and ultimately prevented defendants from fair jury deliberations, in that improper extrinsic evidence entered its way into the jurors deliberations; the same extrinsic evidence that was not disclosed during voir dire.

6. Believing that at least one juror was not honest and forthcoming in his answers during voir dire and that extrinsic evidence may have improperly come into the deliberations, I hired the Stein Investigation Agency to speak with the jurors.

7. I again spoke to Mr. Wilhite, this time by phone, wherein he stated that the foreperson, juror no. 3, Mr. Eggert, had approached him on the first day of trial and said "this is bullshit." Mr. Wilhite then asked what he was referring to and Mr. Eggert indicated that he was referring to Daniel Mason's testimony. Eggert then stated to him, "I can't believe this. Mr. Wilhite also told me that on the second day of trial he had spoken to 4 jurors and asked them, in essence, "which way are you leaning?" Mr. Wilhite stated to me that he asked Mr. Eggert which way he was leaning, and Mr. Eggert relied, "my only question is why they had to put their guns in their faces,

or why they had to have them drawn." Eggert told Wilhite that he totally believed Daniel Mason's version and would not believe the cops. Mr. Eggert then stated to Wilhite "it's all plaintiffs dude." Mr. Wilhite took this to mean that Mr. Eggert had already made his mind up about the case. Mr. Wilhite also stated that he asked the same question to juror no. 1, Mr. Garcia, who answered "the plaintiffs." Finally Mr. Wilhite asked juror no. 4, Ms. Tarter, the same question but got no reply.

8. Mr. Wilhite stated to me that during deliberations he shared his prior observations of police misconduct with the other jurors. He stated to me that he received a unanimous response from the other jurors. In essence, the response he received was "we know that it happens all the time."

9. Mr. Wilhite then stated that during deliberations juror no. 7, Ms. Justis, commented on the handwriting of one of the defendants that appeared on a citation to the other jurors. Mr. Wilhite stated to me that she told the other jurors that it indicated that the defendant was a "deviate sociopath." Mr. Wilhite stated that juror no. 2, Ms. Schulmann, then concurred with that assessment.

10. Ms. Justis has herself stated to a Stein Agency investigator that she is studying for a Master's Degree in Sociology and that she analyzed the handwriting of Officer Danjou and concluded that it was very small and indicated that the writer was introverted and might have something to hide and shared these findings with the other jurors. Ms. Justis stated that this is a hobby of hers, has read books on the subject and uses the Internet regarding handwriting. Ms. Justis also recalled that

another female juror had also commented about the handwriting of the officers. Ms. Justis stated that what she and the other juror did was "pop psychology." Ms. Justis also stated to the investigator that "it is a known fact that police over-react when confronting young black males," however, I do not recall that Ms. Justis ever sharing this observation with the court during voir dire when asked if there is anything about this type of case that would cause you to not be fair and impartial. Defendants could not receive a fair trial if in fact Ms. Justis held that belief and willfully kept this from the defendants during voir dire, and allowed extrinsic evidence to come into deliberations.

11. Mr. Eggert, the foreperson, stated to an investigator that he had once had an unpleasant experience with the police. I recall that Mr. Eggert had shared this with the court. However, Mr. Eggert told the investigator that he had been shoved against a van and had been treated roughly on that occasion. Mr. Eggert never stating those facts, being shoved against a van by the police or that he had been treated roughly during voir dire. Mr. Eggert purposely hid these facts from the defendants. The defendants were prejudiced in the jury selection process by the withholding of material information and in the deliberation process because of this extraneous information being used by the foreperson in the deliberation process.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and

correct and that this declaration was executed at Torrance, California on the 23rd day of June 1997.

/s/ Robert D. Acciani
Robert D. Acciani

DECLARATION OF JOHN S. WILHITE

I, John S. Wilhite, declare as follows:

1. I was juror number 5 in the action entitled *Price et al. v. Kramer et al., CV 94-6504 JSL.* As such, I have personal and first-hand knowledge of the facts set forth below and, if called upon to do so, could and would testify competently thereto under oath.

2. My brother is a police officer for the Los Angeles Police Department, and I have been on a ride-a-long with police officers in the past. On one of these ride-a-longs I personally observed improper police conduct, that is, officers call the detainees "assholes," observed officers rip out a stereo radio from a car and pour beer into the trunk of a vehicle. I did not disclose these facts when asked about knowing anyone in law enforcement or any unpleasant experiences with law enforcement because I did not remember at that time.

3. On the first day of trial Mr. Eggert, had approached me and said "this is bullshit." I asked what he was referring to and Mr. Eggert stated, "I can't believe this, that the cops could do this and get away with it."

4. On the second day of trial I spoke with 4 jurors and asked them, in essence, "which way are you leaning?" I asked Mr. Eggert which way he was leaning, and Mr. Eggert replied, "my only question is why they had to put their guns in their faces, or why they had to have them drawn." He told me that he totally believed Dan Mason's version of the events and stated that he would not believe the cops. Mr. Eggert then stated, in essence, "its all plaintiffs, dude." I took this statement to mean that Mr. Eggert had already made his mind up about the case.

5. I also asked juror no. 1, Mr. Garcia, which way he was leaning and he stated "the plaintiffs." Finally I asked juror no. 4, Ms. Tarter, the same question but got no reply.

6. During deliberations I shared my prior observations of police misconduct with the other jurors. I received a unanimous response from the other jurors. In essence, the response I received was "we know that it happens all the time."

7. I remember that during deliberations Mr. Eggert stated that he had been "punked around by the cops," on a prior occasion.

8. During deliberations Ms. Justis, commented on the handwriting of one of the defendants that appeared on a citation to the other jurors. She stated "look at how small and tiny the handwriting is, it looks like the writing of a deviate sociopath." Ms. Schulmann then agreed with Ms. Justis.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and

correct and that this declaration was executed at Downey, California on the 23rd day of June 1997.

/s/ John S. Wilhite
John S. Wilhite

PORTION OF REPORTER'S TRANSCRIPT FROM POST-TRIAL HEARING (JULY 21, 1997), pp. 37-72:

* * *

[37] THE COURT: I don't like to put the guy to a lot of trouble, I don't like to put you all to that kind of cost. You all have to come, it costs money, it takes time.

MS. SHEN: I think he should ask him to come in, if he can. I'm saying the judge suggested that maybe he can question him over the phone now, which is what I'm saying, I would prefer that we actually have a hearing.

THE COURT: I think we'll do that. We'll have an evidentiary hearing right now, we're all here. If I can reach him, we'll do it right now.

MR. ACCIANI: I was just reminded, looking at his file, I believe he works for LA Cellular, which is the headquarters in Cerritos. I believe that's a home phone number.

THE COURT: I think we'll have this hearing right now. Let's see if we can get the guy.

MS. SHEN: Our objection is noted.

THE COURT: Well, I'll overrule your objection.

(Other court matters.)

(Conference call.)

UNSWORN STATEMENT OF
GLENN EGGERT TELEPHONICALLY

THE COURT: Mr. Eggert, this is Judge Letts.

MR. EGGERT: Oh, high, Mr. Letts, how are you?

THE COURT: Well, I'm fine.

I have a roomful of people, all –

[38] MR. EGGERT: Wow, interesting.

THE COURT: – the people that were involved in the Price case, all the lawyers who were involved in the Price case.

Let me give you the background, and then if you will accommodate me, I just want to ask you some questions and get on from there.

MR. EGGERT: Oh, no problem.

THE COURT: The defendants followed up with some of the jurors, specifically with Mr. Wilhite, and Mr. Wilhite described some things about the jury deliberations and about things said in them.

MR. EGGERT: Mr. Wilhite is the investigator?

THE COURT: No, he's one of the jurors. He was that sort – he sat in the back, I think he was juror No. 5, and he was that sort of rough-and-ready guy.

MR. EGGERT: Big guy?

THE COURT: Yes, pretty outspoken.

MR. EGGERT: Flat top?

THE COURT: Yes, that's the guy.

MR. EGGERT: All right.

THE COURT: Anyway, he said some things that led there to be some questions that I needed to ask you, or have asked.

I said to him – he's been here, he actually [39] testified – I said to him, I'll say to you, don't worry about it, I'm not looking down your throat, I cannot imagine that there's anything you could say that would make me look down your throat or his or any of the other jurors.

I liked that jury when it was assembled, I liked you all individually and collectively after I met you, and there isn't going to be anything here that would cause me to be critical in hindsight with anybody.

There are some questions, though, that need to be answered, and with that, if you don't mind, I'm just going to let them ask them.

Do me this favor, if you would – I know you would, but I'm still going to ask for the favor – if in your judgment there really was something wrong with the way that verdict was reached, I want to know it.

I don't care whether it comes asked in a specific question or how it comes out, if there's reason to doubt that we got that verdict fairly and correctly, I need to know that.

As strongly as I believe in the system, if we screw it up – and most of the time it's my screw-up – if we screw it up, we have to get it right, so just take that as the starting place.

If there is anything that you feel like we ought to know, help us get there; otherwise, just sort of [40] answer the questions.

EXAMINATION

BY MS. SHEN:

Q Mr. Eggert, this is Martha Shen.

A Hi, Martha.

Q How are you?

A Good; extremely busy but good.

Q Sorry; I'll try to make this quick.

A Oh, no, I didn't mean – I'm not trying to minimize what we're talking about, I'm just saying that it's a busy day for me.

Q I just have a few questions.

Remember that incident that you told us about during jury selection involving your getting a citation; you were trying to stop a fight, you were being a good samaritan, and there was like an open container involved, and you told us about that incident; do you recall that?

A Oh, absolutely.

Q Okay.

And then you also said to us during jury deliberations that in hindsight you looked back and you thought that the officer who gave you the citation was just doing his job; do you remember?

A Correct.

Q Now, during that incident, you were also physically [41] pushed or shoved up against a van by police officers; is that right?

A Correct.

Q Okay.

A My best recollection.

Q Okay.

A He did physically, like, yeah, push me, but to what extent, I mean, it might have either been exaggerated or forgotten over time, but I know he did make contact with me that involved me backing up against a van or some type of vehicle behind me.

Q There was physical contact, in other words?

A Right.

Q He did touch you?

A Correct.

That's why the impression kind of resonated so strongly.

Q Okay.

And during the jury deliberations, you did mention that in open deliberations, right?

A I'm sorry; like while we were in the jury room?

Q Right.

A Did I mention that?

Q Right.

A I believe I did, yes.

[42] Q Okay.

And actually you told them about the physical aspect of the encounter with the police, too, correct?

A Possibly.

Q Do you remember telling Mr. Wilhite, or any other member of the jury, that you actually were punked around by the police during that incident?

A I was kind of what?

Q Punked around.

A Punked?

Q Yes, p-u-n-k-e-d, I think.

A I doubt it, because that's not really a work I usually use, the word *punked*.

The only thing that I would have really described it as is just some type of – I don't know, like some type of – just impression that really shocked me at the time.

Q And you didn't think that that was right, the physical part of the contact, correct?

A Not at the time, no.

Q And do you now think that that was correct behavior for a police officer, that he pushed you or somehow made physical contact with you and caused you to go up against a van; do you think today that that's correct behavior?

A I think it was – I think it was reasonable, I guess, [43] but it was borderline reasonable.

Q Do you think that maybe it was – well, the impression that you were left with, was it that it was maybe a little more than the officer should have done, a little too rough or just a little much?

A Correct.

Q Okay.

And is that also what you told the jury as well?

A I believe – I believe I probably mentioned it, yeah.

Q Okay.

Did you also tell Mr. Wilhite on the first day of trial, or first few days of trial, something to the effect that after listening to Mr. Mason testify, that you believed what he said?

A Yes, I recall that.

Q Do you recall also telling Mr. Wilhite that you could not believe that the police had done this?

A I'm sorry; what was that last part?

Q That you couldn't believe that the police had done this based on Mr. Mason's testimony?

A *I couldn't believe that the police had done this,* perhaps; I don't recall saying that exactly.

Q Do you recall saying something to that effect?

A I remember leaving that particular day after hearing [44] Mr. Mason's testimony as being very credible,

very believable, not believable meaning like I could believe it, but that I did believe it, and that the actions of the police officers with the firearms pointed at them was way out of line.

Something along those lines, that's kind of what I was thinking.

Q Okay.

And this was actually before you began deliberating, right?

A I guess so, technically.

Q Well, it was almost immediately after Mason testified, correct?

A I think what we really spoke of were like impressions of his credibility, if I'm not mistaken. I mean, we didn't really go into the minutiae of like the notes, oh, I took a note on this; what did you think of that.

I think it was more like impressions.

Q Right; I'm just asking about the timing right now.

This actually happened around the time Mr. Mason testified and before any of the officers testified, correct?

A In terms of impressions of credibility, yes.

Q And did you at any time before you began deliberating and before the police officers testified, tell Mr. Wilhite [45] that you would not believe the police officers?

A No, I don't recall saying that.

Q Did you say anything to that effect?

A I recall saying that, yeah, obviously it's – I guess this is just – this is my first time I've ever been on a trial, I guess this is the way the normal process goes, you hear the plaintiff's side first.

And I remember saying that, you know, I'm very interested, I'm extremely interested as to what the police officers' side of the story is going to be; I remember saying that.

Q My question is, did you say anything to the effect of, either to Mr. Wilhite or anybody else, before the police testified that you would not believe the police officers or you would have a very tough time believing them; something to that effect?

A No, I don't recall saying that.

Q Oh, by the way, I forgot to ask you one question.

Regarding the incident that you were involved in when you were 17 or so –

A Uh-huh.

Q – did you at any time express to any other member of the jury that you could actually identify with the plaintiffs because this had happened to you?

A I'm sorry, I was kind of distracted, people are [46] walking up to my desk.

The last part is whether I –

Q Whether you –

A Did I mention that to other jurors?

Q Whether you said to other jurors, or Mr. Wilhite or other jurors, something to the effect of you can identify with the plaintiffs because of what had happened to you in your personal experience?

A I might have said that; I really don't recall, to be honest.

I'm not trying to be argumentative or whatever, I really don't remember. I could have, that seems plausible.

Q Did you speak with Mr. Wilhite almost on a daily basis about how credible you believed the plaintiffs' case was?

A No, because I remember maybe the first or second day we had lunch, and I kind of, like, you know – he was kind of – you know, we were just kind of making conversation, kind of talk in very vague bases on our impressions of the first couple days, or maybe it was the first day, whatever.

And after that he just basically started to get on my nerves, so I just kind of distanced myself from him. He was – I don't know, he was really encouraging a lot, asking a lot of questions, wanting to kind of engage in a lot of – type of – I guess what you'd say pre-deliberation, or whatever.

[47] And I didn't really – I didn't really spend a lot of time with him outside of the – outside of the courtroom, other than when we were in the jury box or in the jury room, like playing cards during, you know, waiting periods, but never like really exclusively one on one, other than maybe the first lunch we had, or second lunch.

Q Did you ever say anything to him, like, *It's all plaintiffs, dude,* whether it was the first day, second day, whether there were other people around or not?

A Can you repeat that?

Q Something to the effect, *It's all plaintiffs, dude,* or *It's all in plaintiffs' favor;* something to that effect?

A I don't know, I might have; I might have said that.

Q Okay.

A I mean, I don't really recall saying that, though.

I mean, that might have been my impression. If we, you know, spoke very vaguely, like walking away on our way to lunch on the first day, like, oh, wow, you know, after opening statements or whatever. After hearing Mr. Mason, I might have said that, because it was, you know, right after the plaintiffs launched their case.

I don't know; I mean, I might have.

Q Mr. Eggert, at the time when we were doing jury selection and you were telling the Court and us about this incident that happened to you when you were younger and when [48] there was physical contact with the police officer and you and the van, when the jury selection process was ongoing and it was your turn to answer questions, did you remember at that time that you actually did have physical contact with the police officer?

A Yes.

I'm sorry, I don't mean – can you please repeat that question?

Q Sure.

Do you remember when you were sitting as a possible juror –

A Okay.

Not actually in the jury box but like in the audience, or whatever?

Q No, you were in the jury box, and remember the judge said – he went kind of down the row and said, *Did any of you answer yes to any of my questions,* and you said, *Yes, I did have a prior contact with the police and I was being a good samaritan,* during that particular conversation, did you remember about having physical contact in addition to the verbal contact with the police officer?

A Oh, of course.

Q Is there some reason you did not disclose that to the Court and to us at the time when jury selection was undergoing?

[49] A Maybe because I was trying to be brief, and maybe I didn't realize – strike me as an important part of the story at the time.

Q Is there –

A There was no – there was no willing – yeah, there was no deliberate effort for me to withhold that, if that's what you're trying to get at.

I mean, if I would have, you know, been asked by Judge Letts directly, was – physical contact would have been made, yeah, I mean, of course, I would; yeah, there was.

I remember being pushed against a van or whatever, but, I mean, I was just kind of trying to be very – you know, if that was a concern, I guess I would assume that I would have been questioned about that.

Again, you know, that was part of my memory of the incident, then and now, you know.

Q By the way, have you spoken with Mr. Price or Mr. Adelson, or any representative from their office before today and after you went home, the last day of trial?

A The only person I talked to is some investigator representing the City of Torrance that showed up on my doorstep like a week after.

Q Did they call you first, by the way?

A No, they didn't.

It was kind of awkward because it was my girl [50] friend's birthday and we were on our way out the door, this gentleman showed up. And he was very cordial and very nice. He wanted to ask a bunch of questions.

And I immediately was extremely concerned because I just didn't know what angle he was taking, you know, I didn't know who this person was, saying he was representing the City of Torrance.

But I immediately that evening got on the phone with my brother, who's an attorney up in Sacramento, asked for his advice, and he suggested I contacted the court clerk of Judge Letts, which I did, the next day, to see, you know, is this a normal practice for jurors, former jurors to be contacted directly in this manner.

I forgot her name, but –

Q Nancy?

A Yeah, the lady that escorted us back and forth, that sits right in front of Judge Letts; that's the person I spoke with.

She returned my call and she said, *Well, you know, if you don't want to talk to this person, you don't have to, but if you feel comfortable, it's usually common practice when especially a city is found liable for a certain lawsuit,* so that's the only contact after the court proceedings that I've had with anybody.

Q Okay.

[51] did you feel harassed by the investigator, or like he was trying to get you to say something you didn't want to say?

A Well, yeah.

I mean, it was – I mean, it was obvious what his intent was. His intent was to try to – he was constructing certain questions to try to find some inconsistencies, and he was trying to size up how much I really – how strong or not I came to the decision I did as a juror.

You know, just trying to find, you know, basically the opportunities to try to, I don't know, overturn the case, or whatever.

My brother, on his advice, as I've said, *You have one of two options; you can just say, you know, I don't want to talk to you, and leave it at that. Or if you really are confident with the decision you made, you can go ahead and answer all of his questions.*

And, you know, I felt extremely confident with the decision I came at, and, yeah, I answered all his questions.

And there were times where I paused and thought a lot about it because he asked very clever questions at times.

Q What I'm –

A But I was fully willing to talk with him about what [52] ever he wanted to talk about.

Q What I'm getting at, Mr. Eggert, did anybody bully you into saying something that you didn't want to say?

A No.

Q Okay.

Is there some reason why you told the jury panel, or the jury, either during deliberations or at some time before deliberations, about your actual physical contact with the police officer who gave you the citation?

A I'm sorry; can you repeat that again?

Q I'm just wondering, you didn't think it was so important to mention it to the Court because you thought if it was important you would have been asked about it, this physical contact that you had.

A Right.

Q What was the reason you decided to bring it up to the jury?

A I don't know.

Maybe at the time we were talking about contact that was made in the case; maybe that kind of resonated my memory or something.

I don't know.

Q Somehow in your mind –

A I mean, it wasn't anything – I mean, it wasn't anything – I mean, I didn't – there was no intent to, you [53] know, either – I mean, you know, to fabricate it or not; I don't know.

Q Actually, I'm not accusing you of that, so don't –

A Oh, no, I'm not saying that you are, but I'm just – I feel kind of silly to say that I really don't have any answer for that because it might have been maybe one of the other jurors, you know, said something and it kind of – you know how conversation go, you just kind of – just kind of – a stream of consciousness kind of, you know, format, and then next thing you know – you know, I shared it in a little more detail than I did during jury selection; I elaborated more under that environment than I did under the environment of being selected as a juror.

Q But –

A Does that answer your question?

Q Not really; maybe I'm not asking it properly.

What I'm trying to get at is there some reason that you did tell us about part of the contact but not the actual physical part during jury selection – during jury selection?

THE COURT: Ms. Shen, I think he answered it.

MS. SHEN: Okay; if the Court says so, that's fine.

THE WITNESS: I think I understand what you're asking, and my answer is I really don't know; I don't know [54] what the reason is, why I did not mention it or did mention it during jury deliberations.

THE COURT: Actually, I'm back closer to the phone.

Ms. Shen, I wasn't cutting you off; did you have any more questions?

MS. SHEN: Well, I did, but –

THE COURT: You can keep on asking questions; I thought he had answered that one and I didn't want you to keep going with it.

MS. SHEN: That was the answer I was looking for, actually; he said he didn't know.

BY MS. SHEN:

Q At the time when you actually stated to the other members of the jury that this had happened to you, had in fact had physical contact with this van and the police officer, at any time do you think that – did it cross your mind – and I'm not passing judgment, I'm just asking – did it cross your mind that perhaps that was something that you didn't mention to the Court or both sides, and that maybe you should bring it up?

A Well, I mean, obviously in hindsight, now that it's become an issue, yeah, I wish I would have, but at the time I really – to be honest, I was surprised that I wasn't

struck from the jury, having had a negative experience and admitted [55] as my experience being negative, that I was kept on the jury, to be honest.

Q So in your recollection, you recall actually telling us that that experience wasn't good?

A What I recall in this – I don't know, I don't have the record in front of me to recall my – you know, whatever, refresh my memory, or whatever – the impression of that jury selection question or the information I kind of shared was that I did have a negative experience in the past with a police officer. It was during high school, you know, and it involved a citation and all that stuff.

Q And in fact that your impression, the impression that you were left with at that time was negative, but it continues to be somewhat negative, true?

A Of that isolated incident?

Q Yes.

A Or in general police officers?

Q No, of that incident.

A Oh, yeah, absolutely.

I mean, the impression of what had happened, it was negative, but in hindsight as time has gone on and as I've matured, I also understand that given the situation, given police officers pulling into a large crowd crowd of adolescents, you know, probably anywhere from 20 to 30 kids walking around, that he needed to calm me down, basically, because I [56] was kind of upset, so at the time it was negative.

THE COURT: I want to cut through this.

What I understood you to have said, but correct me if it's wrong, it was and remains a negative event, but you no longer blame anybody for it?

THE WITNESS: Correct.

THE COURT: Is that a fair statement?

THE WITNESS: My impression of that is still negative and it did like affect my opinion about police officers to this day, but I do also – yeah, correct.

THE COURT: Okay.

MS. SHEN: Thank you.

THE COURT: I think that's the last question.

Do you all have any?

MR. ADELSON: Just one.

THE COURT: Quickly.

EXAMINATION

BY MR. ADELSON:

Q Mr. Eggert, you indicated that you would have been eager to hear what the police officers had to say; if they had persuaded you that Dan Mason had not told the truth, would you have voted the other way?

MS. SHEN: I'm gong to object, Your Honor; that's speculation.

THE COURT: I don't think it's a good question.

[57] MR. ADELSON: All right; I'll withdraw it, and I have no questions.

THE COURT: Let me finish where I started.

I liked that jury, I liked everybody on it, I liked you, I don't like you any less now. This isn't something that comes up every day, it's not something – if you have jury experience, you don't have to expect that any part of this is going to happen to you, that you're going to be interviewed in this way or that you're going to get a follow-up phone call. It's a case where we are where we are.

And I say what I started by saying, that jury, from everything I saw of it and know of it, it did its job as well as it could, individually and collectively. I have no second-thoughts about it.

It remains true even at this minute, if you have some doubts about anything that happened, I wish you'd tell me; I really wish you would. I think you would, but I'd like to be sure you would.

You remember what I said to you, the juries have to wind up with confidence in themselves, they have to wind up thinking they did the job well and that that's a good way to do justice. If there's any juror here that thinks otherwise, that's very different.

Did we ask you all the right questions; are those –

[58] THE WITNESS: I understand what you're getting at, Judge Letts. The only thing I would say at this point would be I don't have any concerns personally with the decision we reached.

The only thing that I did kind of have concern with a couple days after was that I kind of wished we might have taken maybe just a little more time to deliberate and reflect on everything.

THE COURT: Yes.

THE WITNESS: I mean, I don't want to say that the decision was rushed, but I think that maybe just extending the deliberation process a little more might have been healthy.

I think as I continue to replay the incidents in my head in terms of what I've heard on both sides, I've not changed my mind in terms of the decision we reached; I do think it was a just one.

THE COURT: Let me close with this thought. I'm sure I said at the time, and this is just for you, between you and me.

When the deliberative process is over, if you don't starting having some doubts about it, there is probably something wrong with that; it's human nature.

THE WITNESS: This is my first experience with this type of system or this type of process, so maybe it was [59] just natural for me to think that.

THE COURT: I probably said it at the time because I try to, there's only two magic moments, and that's when you give the verdict, because the process that got you there is over and the process of doubt without help starts. That doesn't take away from what I was saying before.

Sometimes you know somehow it doesn't feel right, this just shouldn't happen this way and I'm sorry I was involved with it, it's that kind of thing.

THE WITNESS: Okay.

THE COURT: If you don't have any of those feelings, I'm glad.

THE WITNESS: If that's the case, no, I don't have any of those.

THE COURT: I'm glad.

If I ever start hearing that from jurors, I'll be very sad. So far I haven't.

I appreciate your help; thanks a lot.

THE WITNESS: Okay.

(Conference call concluded.)

THE COURT: I heard him I guess that time just the way I heard him the first time. I don't know how many of those words, because I didn't look back at his voir dire, are identical, but that's what I thought I got out of it the first time.

[60] MS. SHEN: No, actually, he never told us about the physical contact, and I think –

THE COURT: No, but what he said was that he didn't think the physical contact was very important, that he thought it went with the territory.

MS. SHEN: No, Your Honor.

What he said was – and I think we put part of what he said in our reply – at that time he said that in hindsight he thought that the police officer was doing his job and –

THE COURT: He said it this time, too.

MS. SHEN: – did –

Excuse me, Your Honor.

– and did what he was supposed to do.

He never said that it has left him with – it did – you know, at that time we knew that he didn't think it was fair, but he never said that to this day he's been left with a bad impression of police officers, and that to this day it's the physical contact, not the citation part, but the physical contact he's left with a negative opinion of, and he very –

THE COURT: I don't think he said that –

MS. SHEN: – clearly said that.

THE COURT: – this time.

MR. ADELSON: I don't think he –

[61] THE COURT: He didn't say that.

MR. ADELSON: – ever said he had a negative impression.

THE COURT: He hasn't said that yet.

MS. SHEN: I do; I mean, I asked the question.

THE COURT: But you didn't get the answer right. The transcript can bear me out on that. The physical contact was routine.

And he said to me – it tracked exactly; and he said it the same way both times – if you asked him today, tomorrow or the next day or 10 days ago, have you ever had an unpleasant experience with law enforcement, he's going to say yes. That's what he did say.

Then he talked about it a little bit and he said again what he just said, all things considered, I don't think the officer – now I understand a little better – I don't think he was doing anything that you couldn't expect.

MS. SHEN: Well –

THE COURT: Did that make it a pleasant experience, no; did it make it not an unpleasant experience, no, it didn't, it's an unpleasant experience to this day.

MS. SHEN: He did not actually say that.

And we do – we had it in here –

MR. ACCIANI: When the Court had instructed the jurors to answer the questions, there was a specific question [62] about whether you had a pleasant or unpleasant experience.

THE COURT: That's right.

MR. ACCIANI: And when it was Mr. Eggert's turn, he responded to the incident when he was 17 under the question of have you ever been charged with a crime.

He started by saying yes to No. 12; 12 was not a pleasant or unpleasant experience, so immediately – and the record will bear me out – he was not commenting on whether he had a pleasant or unpleasant experience, but went straight to the citation and discussed it.

It's in the reply brief, specifically stated that I was 17 years old, and he rambled – I don't want to say rambled or characterize it that way – he said – if I may, he said:

> *I was in high school, like 17 years old. I was involved with trying to break up a fight at Jack-in-the-Box, you know, a high school football game, and like an alcoholic beverage fell out of my jacket and smashed on the asphalt, and right when that happened, a police officer pulled up, and then cited me for an open container.*

You had then asked, Your Honor, if the police had let everybody else go.

[63] And Mr. Eggert replied:

> *Yes, let everybody else go. I thought I was – I mean, unfairly – I mean, at the time I was kind of upset. I was young, but I just felt, you know, I was kind of being a good samaritan breaking the fight up, and I got busted, basically, but in hindsight I knew that he was doing his job to secure the situation.*

That was it. He was finished, you went to the next juror.

Based on that statement by Mr. Eggert, there was not a reason for us, for me, to say, Your Honor, we need to question him more.

Not only did he not answer the question under a pleasant or unpleasant experience, but under the question of he was charged with a crime.

There is nothing to be gleaned from that statement that there was any physical violence or physical force used on him at all.

He had already been read a statement of the case, he knew that the case involved 17 year old plaintiffs who had been physically assaulted or allegedly physically assaulted.

And he stated just now that he knew that that [64] was – that he had been – physical force had been used, and he – I mean, I don't want to say willfully – he made the conscious decision not to include that because he made the decision that it was not important, and therein lies the problem of getting a fair trial.

He decided on his own, unilaterally that he did not need to tell the attorneys, in fact the defendants, that, yes, I have been involved in a physical altercation when I was 17 years old, and basically I'm not going to tell you about it, and we went on our merry way believing that we had gotten a forthright answer, which we didn't.

And he stated just now, it was an unpleasant experience, it was then and it is now. He may say he understands all about it, but how you could then continue, you get selected as a juror, there's contact with Mr. Wilhite, and then states that physical force used o him as the foreperson in the trial.

I mean, if that does not manifest itself as bias in a juror, personally, I don't know what does. That's the problem I have.

THE COURT: If you challenge anybody else in the room for as long as five seconds to give you a better example than that one, you would lose. I can tell you, that argument, to me, has no weight.

MS. SHEN: And, certainly, Your Honor, you –

[65] THE COURT: That's the only way that I can say that.

MS. SHEN: We're not saying he maliciously, you know, or deviously withheld information. I don't think that's the standard, nobody has ever said that that's the standard in any case.

It just says that they intentionally –

THE COURT: Indeed, I think they have.

MS. SHEN: I'm sorry?

THE COURT: It depends on what it is.

MS. SHEN: The cases just say that he intentionally did, and he did intentionally. And Whether it was became he was being a good person, you know, that all is irrelevant, he just did.

THE COURT: I don't agree with that.

MS. SHEN: For –

THE COURT: He was not asked.

He did make an interpretation of the question whereby he didn't think that was a necessary part of it and he didn't think it was so important that he should volunteer it without a question; that's what he said.

MS. SHEN: But then he didn't answer in the affirmative when asked about bad experiences or particularly good experiences with police officers.

He answered this under –

THE COURT: I construe his answer as thinking [66] that that included both.

MS. SHEN: And one other thing –

THE COURT: And I'm sorry, but I'm finished listening.

MR. ADELSON: Isn't the test whether it would provide a challenge for cause, and that nothing he said would provide a challenge for cause?

MS. SHEN: That isn't the test, and nowhere does it say that.

THE COURT: Whatever the test is, it doesn't meet it.

MS. SHEN: And the other thing is, Your Honor, he did say it continues to color his opinion about police officers, and he said that on the phone. And never once did he say that during voir dire.

THE COURT: I know what he said, and I suspect that there are very few people that have had contact with police officers that haven't had their opinions colored by them.

What he said clearly was it was a negative experience, the way he described it the first time, it was clearly negative. He said he resented it.

He didn't say the first time that he no longer regards it as a negative experience. He didn't say that he was wrong to resent it.

[67] What he did say was now that he's older and he can understand the cops' side a little better, he no longer blames them for it. That's what he said the first time, and that's what he said the second time.

Did it color his view of law enforcement, no doubt it did, and no doubt – well, maybe some doubt – but I would suspect that almost everybody in the room has had some experience that colored his view of law enforcement, good, bad or indifferent.

MS. SHEN: I do remember specifically asking him whether to this day he thinks that the force that was used was too much or overboard [sic], and he said yes. That's not consistent with what the Court says –

THE COURT: That's not what he said.

MS. SHEN: – which in –

THE COURT: That's not what said.

I don't care, I don't agree with your position; I'm going to rule against it.

MS. SHEN: If the Court doesn't care, there's nothing I can say, you know, obviously.

THE COURT: As to that specific, I don't agree with your memory.

What I said is I don't agree with your memory, but if your memory proved out, it would make no difference; that's what I said.

[68] It does not seem in the context of this trial – what he did say gave to me complete notice of everything that he just said, and doesn't differ from –

MS. SHEN: I don't wish to argue with you.

THE COURT: Then stop, because I've just ruled.

MS. SHEN: Right.

I was just making –

THE COURT: I just ruled.

MS. SHEN: If I can, I was just trying to make a record and tell – you know, I'm not passing – saying the Court doesn't recollect what the guy said, that's not what I was trying to say.

THE COURT: I just ruled.

To me, what he just said, every word that he said he gave notice of the first time. I didn't find any difference.

Indeed, the guy looked to me then and now like he's trying his best to do a balanced view. The last thing he said, which I feel for him about, he now thinks, gee, he wished they'd taken a little longer. Well, people always think they wished some part of the deliberations were a little different.

The guy's conscientious and I don't see any malfeasance and I don't see any reason to believe it made any difference at all.

[69] He can't remember, Wilhite can't remember, I have no reason to believe anybody else will ever remember the context in which he mentioned it or whether it could have made any difference.

Now, that was my fault, I ruled, and I stopped you and I kept talking, that's not fair. I've ruled.

MS. SHEN: Okay.

MR. ACCIANI: The only thing I'd like to add, Your Honor, is that it's almost a two-prong attack on that

issue as to Mr. Eggert not being forthright, which you've just ruled on.

The next question was the fact that he did share this with the other jurors as the foreperson, and I think that was really the crux, both things were –

THE COURT: I ruled on that, too.

I have no reason, based on anything I heard today or have seen in the declarations, to believe that it made any difference at all. Nobody can even remember the context in which it came up.

And he said, as I understood him, consistently, yes, it happened, I didn't think it was important then, and that's why I didn't say anything about it, nobody asked, I didn't think anybody else thought it was important. It came up in the context of deliberations and I don't remember even what context, and neither does Wilhite.

[70] MR. ACCIANI: Well, the only thing I'm interested in – I understand the court's ruling – is in other words, the Court is saying that based on what you've heard, you are finding that the statements, omissions, whatever you want to call them, had no impact on the deliberations, and that there was no – and these are my words, so obviously the Court can disagree with them; I'm trying to figure out the standard myself – that in fact there was no reasonable probability or possibility that any one of the jurors, including Mr. Wilhite, could have been prejudiced by these statements by Mr. Wilhite and Mr. Eggert of this police actions [sic] that I find to be extraneous and, therefore, prejudicial.

That's what I'm concerned about. If the Court is finding, no, that those –

THE COURT: I don't think those are extraneous deliberations, first; number two, I don't think there is a reasonable possibility that they affected it, because if I thought there was, I would expect somebody to have some memory of the context in which they were said, and I thought both the people testified honestly, or told me honestly.

MR. ACCIANI: Well, they –

MS. SHEN: could we be given an opportunity to bring in – I mean, because this hearing was very quick – I mean, in terms of –

THE COURT: And the answer is no.

[71] MS. SHEN: – the time of the hearing of the motion and the times of the evidentiary hearing –

THE COURT: The answer is no.

I've heard the two relevant people. I believe them and I'm not going to listen to a lot of other people. There was not enough basis today for me to have an evidentiary hearing and I'm not going to have it.

MR. PRICE: Can I conclude, Your Honor, that we have had an evidentiary hearing today?

THE COURT: We've heard all of the evidence that went to the principal allegations, and the only evidence that could be adduced that we haven't heard was other evidence of the context in which this was said, and other evidence of the impact on the particular jurors. In

the circumstance that we have, I don't see any reason to now be calling in all the jurors.

I regard it as an extraordinary act to go as far as I did in examining these witnesses. I didn't and don't think the written showing really called for that.

It is a situation, though, quite frankly, because of the way, to my knowledge, it's developed after the fact, which I'm not going to comment on at this time, but it is a circumstance that generated – this record here I'm going to put under seal; I don't want to see this in the newspapers, I did not want to see the other one in the news- [72] papers, I don't want to see this in the newspapers because it gets in the way of trying to do things fairly.

I thought in these circumstances where there has been this unusual string of developments, which I participated further in than I like to, I thought I should really go as far as I could.

And Wilhite I remember and I remember Wilhite the same way I see him today, and I thought, I'm going to see the guy, see what he looks like.

This fellow I remember the same way, too, and it didn't surprise me that he was the foreperson because he presented himself as a thoughtful sort of reflecting person. And he presented himself the same way Wilhite described him, which was a guy that wasn't confrontational, that would sort of listen to other people's views. That's the way he still sounds.

When he says – because he's very credible with me – when he says this thoughtful, reflective guy now sort of wishes it would have gone on a little younger, it doesn't

sound like this is a guy that bullied anybody into his opinions; I don't think so.

I think I've heard, as I said, more of this than probably was called for. I've said what I did, but I don't think there's any point in going any further.

* * *

Supreme Court, U.S.
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(2)

No. 99-1881

IN THE

Supreme Court of the United States

ALBERT KRAMER, *et al.*,

Petitioners,

v.

MARILYN PRICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a civil rights lawsuit under 42 U.S.C § 1983, does the failure to appeal from a pretrial order denying qualified immunity to two police officers result in a waiver of the issue insofar as it is based on the record that existed at the time of the pretrial order?

2. Where two jurors withhold pertinent background information on voir dire that directly relates to the case and then disclose that information during deliberations, does such conduct deprive a party of a fair trial?

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SUMMARY OF OPPOSITION

1. Petitioners do not address the fact that there was an intervening *trial by jury* between the pretrial denial of qualified immunity and Petitioners' appeal. Petitioners cite no authority for their position that an appeal of a pretrial denial of qualified immunity after a jury verdict must be decided only on the pretrial record, ignoring the facts found by the jury. The cases cited by Petitioners only affirm the undisputable proposition that qualified immunity is not waived by failing to take an interlocutory appeal. None of the cited cases support the position that a jury verdict should be disregarded in deciding qualified immunity.

2. Both the District Court and the Ninth Circuit found that the jurors in question did *not* intentionally withhold information on *voir dire*, and that the inadvertent omissions were not "relevant" and did *not* involve "pertinent background information" that "directly relates to the case". Petitioners have failed to demonstrate that the applicable standards for reversal based on jury misconduct were met.

LACK OF JURISDICTION

Rule 10 of the Rules of the United States Supreme Court provides that this Court may grant a petition for a writ of certiorari only for compelling reasons. Rule 10 also provides that such petition will rarely be granted when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Respondents submit that Petitioners have failed to satisfy Rule 10, and their Petition should be denied.

INTRODUCTION

This case involves two police officers who, without reasonable suspicion or probable cause, stopped Respondents' vehicle and submitted Respondents, teenagers with no prior experience with the police, to a terrifying experience in which Petitioners pointed their guns at Respondents' heads and deliberately and painfully squeezed Respondents' testicles while searching them. Petitioners then lied repeatedly about what had happened. A jury found Petitioners liable, and imposed a total of $245,000 in compensatory and punitive damages.

Without permission from the District Court, Petitioners had an investigator follow the jurors to their homes and interrogate them, whereupon statements made by the jurors were used as a basis for a motion for a new trial. After an evidentiary hearing, the District Court denied the motion. Petitioners then appealed, raising the denial of pretrial qualified immunity, and the failure to grant qualified immunity post-trial. The Ninth Circuit reviewed the qualified immunity determination based on the findings made by the jury and affirmed. It likewise affirmed the District Court's findings that the alleged juror misconduct did not warrant a new trial. Petitioners filed a petition for rehearing, which did not address the alleged jury misconduct, but raised the identical arguments presented here. The petition was denied.

QUALIFIED IMMUNITY

Petitioners' imply that the Ninth Circuit refused to review the denial of Petitioners' entitlement to qualified immunity because they failed to take an interlocutory appeal. That is simply not the case.

As a threshold matter, Petitioners did *not* request qualified immunity in conjunction with either a motion to dismiss [Fed. R. Civ. P. Rule 12] or a motion for summary judgment [Fed.R.Civ.P. Rule 56]. Rather, Petitioners sought immunity through a "motion in limine". [Appendix at 60a] In doing so, Petitioners neatly avoided the strictures of both Rule 12(b)(6), which requires the allegations of the complaint to be taken as true, and Rule 56, which requires *evidence* to support the claim for judgment.

Petitioners' *in limine* motion neither conceded the allegations in the complaint nor submitted evidence in support of judgment. Rather, it set forth Petitioners' unsworn version of the facts and asked the District Court to grant qualified immunity based on those allegedly "undisputed" facts.

Respondents opposed the motion, arguing that the facts alleged by Petitioners were vigorously disputed by Respondents, thus precluding pretrial qualified immunity. [Appendix at 73a] The District Court agreed. [Appendix at 49a] Specifically, the District Court relied on Respondents' allegations that Petitioners had approached Respondents with their guns drawn and pointed at Respondents, and that Petitioners had deliberately squeezed Respondents' testicles while searching them. Petitioners denied doing these things. The District Court found that these disputed facts must be resolved by a jury. Petitioners did not appeal this ruling and allowed the matter to go to trial.

The jury found Petitioners liable for violating Respondents' constitutional rights. No basis for liability could have been found if the jury had accepted Petitioners' version of the operative facts, *i.e.*, that Petitioners had

probable cause to stop Respondents' vehicle, did not point their guns at Respondents, did not deliberately squeeze Respondents' testicles while searching them, and did not conduct an unlawful search of Respondents' vehicle. The jury plainly rejected Petitioners' testimony, and believed Respondents' version of the incident, *i.e.*, that Petitioners *did* unlawfully stop Respondents' vehicle, pointed their guns in Respondents' faces, maliciously squeezed Respondents' testicles, and unlawfully searched their car. Since Petitioners denied doing these acts, it is undisputable that they could not claim that they "reasonably believed" it was "lawful" for them to do what they expressly denied doing.

Moreover, the award of punitive damages further negated Petitioners' claims. The jury was instructed that "[y]ou may award punitive damages only if you find that the defendant's conduct was malicious, wanton, or oppressive or in reckless disregard of the plaintiff's rights." The jury awarded Respondents $225,000 in punitive damages, a finding totally irreconcilable with Petitioners' argument that they "reasonably believed their conduct was lawful." The award of punitive damages demonstrates that the jury found Petitioners' conduct to have been, at the very least, unreasonable.

Petitioners have never explicated how the jury's verdict could support qualified immunity. Petitioners do not argue that pointing guns in Respondents' faces because they were not wearing seatbelts was objectively reasonable. Nor have they ever argued that it was objectively reasonable to squeeze Respondents' testicles. Nor did they justify searching Respondents' car without probable cause. Rather, they denied doing these things.

The jury did not believe Petitioners' version of the incident. It found Petitioners liable and imposed punitive damages. By no stretch of the imagination could it be said that the facts found by the jury supported qualified immunity.

Accordingly, to grant post-trial qualified immunity would have required the District Court to completely disregard the evidence adduced at trial and the jury's verdict. It is not surprising that the record reveals no request from Petitioners for the District Court to do so.[1] Nor did Petitioners make any such reference in their briefs to the Ninth Circuit. It thus appears that Petitioners' contention is that the District Court should have *sua sponte* granted qualified immunity *after* the jury found Petitioners liable and imposed $225,000 in punitive damages against them. Therefore, what Petitioners necessarily argued was that the jury verdict was wrong, and it should have been disregarded by the District Court.

This was the posture Petitioners presented to the Ninth Circuit. Petitioners demonstrated no entitlement to qualified immunity after the facts had been developed at trial. They spent only 2½ pages of their 70 page brief arguing in support of post-trial qualified immunity. Those arguments were meritless. Petitioners' first argument was that the District Court had failed to consider the "totality of the circumstances" by holding that Petitioners' observations before the stop "were not cumulative" for purposes of assessing probable cause. The second was that the District Court's evidentiary rulings prevented it from "properly assessing" Petitioners' conduct.

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1. Petitioners' Motion for a New Trial significantly did *not* mention qualified immunity.

Petitioners' "totality of the circumstances" argument was that in determining whether there was probable cause to stop Respondents, the District Court failed to consider whether the existence *vel non* of the alleged California Vehicle Code violations should be aggregated with Petitioners' claims that Respondents were acting "suspiciously".[2] However, the question of whether there was probable cause to stop Respondents for Vehicle Code violations was *necessarily* separate and distinct from the claim that Respondents were acting "suspiciously". Simply said, the alleged "suspicious behavior" could not bear on whether there was probable cause to believe Respondents were violating the Vehicle Code. Likewise, having a taillight out or not wearing a seat belt did not make Respondents any more "suspicious". As stated by the District Court, Petitioners "either had probable cause on the basis of the light and the seat belts or they didn't."

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2. It should be noted that Petitioners did not object below to the comments it later challenged on appeal. In any case, Petitioners' contention is misleading. The alleged comments *were not even made in the context of a legal determination of probable cause*. Rather, they were off-the-cuff comments made during the discussion of an unrelated issue: the relevance and/or admissibility of Respondents' hand-drawn diagrams. Respondents argued that the diagrams were relevant to refute Petitioners' claim of "suspicious behavior" by Respondents. At this point the District Court made comments to the effect that the allegedly "suspicious behavior" could not provide probable cause absent the Vehicle Code violations, while the Vehicle Code violations would provide probable cause even absent the "suspicious behavior". This was a correct statement of the law, but one without any legal effect. The District Court excluded the diagrams, and the probable cause issue went to the jury. The District Court never instructed or otherwise advised the jury of any judicial determination on the issue. Thus, there was no possible prejudice to Petitioners' case.

The District Court correctly opined that Petitioners either did or did not have probable cause to stop Respondents' vehicle based solely on the Vehicle Code violations, and that the alleged "suspicious behavior" did not change the analysis.[3] The need to consider all the evidence does not convert the "totality of the circumstances" into a talismanic mantra that requires the aggregation of irrelevant facts into a whole that cannot be justified by the sum of its parts. Probable cause is determined on an objective basis, which does not rest upon "[r]igid legal rules," but rather on a "common sense," "practical," and "nontechnical" analysis. *Illinois v. Gates*, 462 U.S. 213, 230-232, 103 S. Ct. 2317, 2328-29 (1983). Petitioners' argument on this issue was completely meritless.

Petitioners also argued that the District Court erred in not allowing defendant Kramer to demonstrate how he performed his search of Respondents' testicles.[4] Petitioners alleged that "without seeing the method of the search" the District Court could not "properly assess his conduct." However, the District Court had already rejected Petitioners' claim of qualified immunity. Simply said, it was the *jury* that "assessed" Kramer's squeezing of Respondents' testicles, not the District Court.

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3. The Ninth Circuit rejected the validity of Petitioners' claims of "suspicious behavior", noting that it "controverted their principal defense at trial", and furthermore that the "factors that [Petitioners] cite, whether taken together or separately, are either improper or inadequate for purposes of establishing reasonable suspicion." [Appendix at 16a]

4. Petitioners did not object to the District Court's ruling at the time and raised the issue for the first time on appeal.

Respondents each testified that Defendant Kramer painfully pulled and squeezed their testicles. For his part, Kramer flatly *denied* doing it. The jury's verdict conclusively demonstrates that they believed Respondents and not Kramer. Petitioners do not suggest how a demonstration of Kramer's testicle-searching technique would have convinced the jury that he was telling the truth.[5] In sum, the gist of Petitioners' argument was again that the District Court erred in failing to believe Petitioners and accordingly disregard the jury's verdict.

Petitioners' claims on appeal thus not surprisingly focused on their request for pre-trial qualified immunity, where the only "evidence" was the allegations made in Respondents' complaint and the counter-allegations in Petitioners' *in limine* motion. Petitioners argued that disputed facts should not preclude pretrial qualified immunity, because "A defense of qualified immunity should only be denied where the facts alleged by the defendant officer could not support a reasonable belief that his conduct was lawful" [AOB23], and "If an unsubstantiated allegation were to preclude a finding of qualified immunity, the doctrine would never be applied." [AOB26]

In other words, the plain import of Petitioners' argument was that qualified immunity should be decided solely on their version of the facts, even without any sworn evidence, and therefore, qualified immunity here should be decided *solely* on the basis of the pretrial record, *regardless* of what the jury later found. [Appendix at 12a]

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5. Indeed, such a conclusion would be highly unreasonable, in light of the plethora of impeachment presented to the jury, including Kramer's admission that he had testified falsely under oath in the hearing on the citations issued to Respondents.

The Court of Appeal was thus presented with a thinly veiled request to stand the law of qualified immunity on its head, requiring the District Court to presumptively resolve disputed facts pre-trial in favor of Petitioners. Petitioners essentially argued that the request for pre-trial qualified immunity "froze" the evidentiary record, allowing Petitioners to take their chances at trial, secure in the knowledge that the jury verdict was of no moment, and would have no meaning unless it exonerated them. The Ninth Circuit understandably declined to grant such license.

Petitioners present no cognizable argument for review of this matter. Petitioners' claim that the decision of the Ninth Circuit "conflicts with the holdings of at least three other circuits" has no merit. Petitioners have cited cases that stand for the proposition that failure to take an interlocutory appeal of a denial of qualified immunity does not bar raising the issue on appeal from a final judgment, while erroneously contending that these cases also stand for the proposition that such review must be made *only* on the pretrial record. As correctly noted by the Ninth Circuit:

> In their Petition for Rehearing (PFR), [Petitioners] mischaracterize our opinion so that it appears we disagree with the general rule — as articulated in other federal circuits — that an interlocutory appeal on the issue of qualified immunity is mandatory not permissive. On the contrary, our decision is fully consistent with the PFR's claim that the appropriate rule to apply is: "an interlocutory appeal from an adverse pretrial ruling on qualified immunity is permissive, not mandatory, and the *issue* is not waived in a later appeal."

[Appendix at 44a]

Reviewing the cases cited by Petitioners, it is clear that the Ninth Circuit's analysis of Petitioners' arguments was entirely correct. The "conflict" alleged by Petitioners is in fact nonexistent.

Ernst v. Child and Youth Services of Chester County, 108 F.3d 486 (3rd Cir. 1997) addressed "whether and to what extent child welfare workers . . . are entitled to absolute immunity for actions taken in connection with dependency proceedings in state court." [108 F.3d 488] One of the Petitioners cross-appealed from the denial of immunity, and the appellant argued that the court of appeal lacked jurisdiction to entertain the cross-appeal because the defendant had not taken an interlocutory appeal from the denial of immunity. [*Id.* at 492] The court rejected that argument, holding that "an interlocutory appeal from a denial of summary judgment on immunity grounds, although permitted, is not obligatory." [*Id.*] The court held it had jurisdiction "to consider the immunity issue". [*Id.* at 493] There was no suggestion that the review was limited to the pretrial record.

In *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993), after a jury found in favor of a defendant officer, the district court granted a new trial. The defendant officer thereafter moved for summary judgment on qualified immunity grounds, which was denied. [*Id.* at 1112-1113] The defendant officer then took an interlocutory appeal. The issue presented was whether the officer had forfeited his right to an interlocutory appeal by failing to assert the qualified immunity defense before the first trial. *Spann* held it was not, but affirmed the denial of summary judgment. In doing so, the court necessarily reviewed the "pretrial record", since the second trial had not yet occurred. Nothing in *Spann* suggests that

this limited review would be appropriate *post-trial.* To the contrary, *Spann* expressly noted that the record the court considered included, among other things, the transcript from the *first* trial.

Goff v. Bise, 173 F.3d 1068 (8th Cir. 1999) involved Petitioners who moved for summary judgment based on qualified immunity. The motion was denied and the case was tried to a jury, which rejected the Petitioners' version of the events and found them liable for compensatory and punitive damages. [*Id.* at 1071] On appeal, the court noted that it normally declined to review the denial of a motion for summary judgment after a trial on the merits. The court found denial of summary judgment based on qualified immunity is an exception to the rule, and accordingly that "the issue of qualified immunity is properly before us." [*Id.* at 1072] *Goff* then affirmed the denial of summary judgment.

Thus, the cases cited by Petitioners affirm the undisputed proposition that failure to take an interlocutory appeal of the denial of qualified immunity does not waive the *issue* on direct appeal from a final judgment. However, they do not require a court of appeal to ignore the trial record. This difference was pointed out by the Ninth Circuit:

> In our opinion, we differed, however, with appellants' suggestion that the summary judgment *order*, as opposed to the qualified immunity *issue*, is reviewable after the final judgment — *i.e.*, that the Court of Appeals should review the pretrial denial of qualified immunity on the basis of the evidentiary record at the time of summary judgment. We held that the qualified immunity *issue* is reviewed on the basis of the full record

> prior to *final* judgment and not on the limited record that existed at the time of summary judgment.

[Appendix at 45a]

In denying Petitioners' petition for Rehearing, the Ninth Circuit also cited 15A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3911, n.80 (2nd Ed. 1992), for the general rule that:

> Failure to appeal pretrial denial of a motion for summary judgment based on official immunity, for example, may be followed by a trial that produces information different from the information made available on the summary judgment motion. *Review after trial should be based on the sufficiency of the evidence at trial, not the sufficiency of the evidence on the summary judgment record.*

[Appendix at 45a, (*emphasis added by the Ninth Circuit*)]

None of the cases cited by Petitioners holds to the contrary. Petitioners have presented no grounds to merit this Court's review of this issue.

JURY MISCONDUCT

On this issue, Petitioners do not contend that the decision below created a "conflict", or discuss any of the other bases for review set forth in Rule 10. Their sole claim is that they were denied a "fair trial" by virtue of juror misconduct.

Petitioners brought their claims of juror misconduct to the attention of the District Court in a motion for a new trial. [Appendix at 109a] The District Court held a post-trial evidentiary hearing to evaluate the claims, and ruled that Petitioners' allegations did not merit reversal. [Appendix at 58a] The Ninth Circuit agreed.

Petitioners do not contend that there is some legal impediment to the Ninth Circuit's ruling. They do not dispute that the controlling rule of law is *McDonough Power Company v. Greenwood*, 464 U.S. 548 (1984). Nor do they suggest that the Ninth Circuit's ruling failed to accord *McDonough*. Rather, they simply disagree with the Ninth Circuit's conclusion, expressing the same arguments here that they did on appeal and before the District Court, *i.e.*, that the courts should have ruled in their favor.[6]

Thus, Petitioners conclusorily state that their claim of juror misconduct satisfied the two-prong test of *McDonough*. [Petition at 19] However, the record speaks to the contrary.

The first *McDonough* prong addresses whether "a juror failed to answer honestly a material question on voir dire". Here, the District Court made specific findings that the alleged omissions resulted from "honest mistake[s]" on the part of two jurors which indicated neither dishonesty nor bias. The Ninth Circuit found "no reason to conclude otherwise" and "no cause to reverse the district court's decision." [Appendix at 36a-37a]

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6. No reconciliation is attempted with Rule 10's advisory that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioners do not dispute these findings; rather, they ignore them. Indeed, Petitioners apply their own version of *McDonough*, where the test is now satisfied anytime a juror fails to divulge a fact on *voir dire*, irrespective of whether the omission was honestly made. [Petition at 19] Since it is undisputed that omissions were made, Petitioners therefore contend the first prong of *McDonough* is satisfied. However, the Court has expressly rejected the concept that "a juror's mistaken, though honest response to a question" can satisfy *McDonough*. [464 U.S. 555] Petitioners do not argue that this reasoning is inapplicable here.

Similarly, Petitioners fail to explain how they have satisfied the second *McDonough* prong: whether "a correct answer would have provided a valid basis for a challenge for cause." Rather, Petitioners again set up their own standard, *i.e.*, that if they knew the substance of the jurors' omissions, it is "undisputed" that they would have *challenged* the jurors for cause.[7] Significantly, the requirement that there be a *valid basis* for the challenge is not discussed by Petitioners. Instead, Petitioners apparently contend that the fact that they *allegedly* would have made a challenge is sufficient, regardless of whether there was any *valid basis* for the challenge.

Petitioners provide no argument or citation to authority to support their contention that the second prong of *McDonough* was satisfied here. To the contrary, the Ninth Circuit expressly found that even if the jurors in question had revealed the omitted information in *voir dire*, the information "would not have provided grounds for a

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7. The appendix citations provided by Petitioners on this point notably do not support that contention.

challenge for cause." [Appendix at 38a] Petitioners do not suggest any basis for invalidating that finding, aside from implying that a different conclusion should have been drawn.

In sum, Petitioners do precisely what Rule 10 counsels against. They ask this Court to find that the lower courts made erroneous factual findings and misapplied the applicable law. Even assuming that had occurred (an assumption categorically unsupported by the record), it suggests no cognizable basis for the Court to grant review. In fact, were the Court to review in detail the evidentiary hearing conducted by the District Court, it would be readily apparent, as it was to the District Court, that Petitioners' allegations were taken out of context, did not accurately reflect the actual statements made by the jurors, and could on no account support a finding of juror bias such as would satisfy *McDonough*. Both the District Court and the Ninth Circuit correctly rejected Petitioners' claims, and no valid reason has been presented why this Court should do otherwise.

CONCLUSION

Justice was properly served in this case. Petitioners violated Respondents' constitutional rights, and a jury held them to answer after a fair trial. Petitioners have failed to present any reason why this Court should review the lower courts' determinations. The Petition should be denied.

Respectfully submitted,

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